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No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

LOUISE KONIK, M.D.,

Petitioner,

v.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, ANESTHESIA ASSOCIATES OF PLATTSBURGH, P.C., DAVID T. HANNAN, As President of Champlain Valley Physicians Hospital, and individually; MICHAEL J. MOYNIHAN, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, and individually; SALEM BAYOUMY, M.D., as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and individually; and JOHN MENUSTIK, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., and individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Question Presented.

Whether Section 1 of the Sherman Act is violated when a hospital with market power in excess of ninety-five percent of the relevant geographic market and a firm of anesthesiologists condition a competing staff physician's access to the hospital by requiring the physician to join in an agreement controlling her practice and establishing maximum fees.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Louise Konik, M.D.[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 25, 1984 in a proceeding entitled *Louise Konik, M.D. v. Champlain Valley Physicians Hospital Medical Center, et al.*

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit, dated April 25, 1984, is printed as Appendix A hereto. It is officially reported at 733 F.2d 1007. The order of the United States Court of Appeals for the Second Circuit denying rehearing, dated May 31, 1984, is printed as Appendix B hereto. This order has not yet been officially reported. The opinion of the United States District Court for the Northern District of New York, rendered on March 2, 1983, is printed as Appendix C hereto. It is officially reported at 561 F.Supp. 700.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 25, 1984. The order of the United States Court of Appeals for the Second Circuit denying rehearing was entered on May 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

Statutes Involved.

The statutory provisions are Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 4 of the Clayton Act, 15 U.S.C. § 15; and Section 16 of the Clayton Act, 15 U.S.C. § 26. These are printed and attached hereto as Appendix D. In addition, Rule 50(a), Federal Rules of Civil Procedure, Motion for Directed Verdict, is printed and attached hereto as Appendix E.

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[1]Referred to herein as "petitioner".

Statement of Case.

This petition seeks review of a judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Northern District of New York, which granted respondents' motion, and denied petitioner's motion for a directed verdict. The action, which was commenced by petitioner on March 30, 1979, asserted four causes of action.

The first cause of action invoked jurisdiction pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1 and 2 and Section 4 and 16 of the Clayton Act, 15 U.S.C., Sections 15 and 26, and 28 U.S.C. Section 1337, and by 28 U.S.C. Section 1331. Petitioner alleged several antitrust violations under Sections 1 and 2 of the Sherman Act. It was contended by the petitioner that respondents' activities constituted illegal price-fixing, vertical and horizontal; illegal group boycott; an illegal tying arrangement; a monopoly; and an attempt to monopolize; and a conspiracy to monopolize. The second cause of action incorporated a claim for civil rights violations arising under the Fifth and Fourteenth Amendments of the United States Constitution pursuant to Section 1983 of Title 42 of the United States Code. Jurisdiction was invoked pursuant to 28 U.S.C. Sections 1331 and 1343. The third cause of action interposed by the petitioner alleged federal contractual claims pursuant to the statutory claims set forth in the Medicare Act, 42 U.S.C. Section 1395 *et seq.* The fourth cause of action alleged non-federal contractual claims based upon breaches of the respondent hospital's by-laws. Jurisdiction of the Court was invoked by way of pendent and ancillary jurisdiction. The fifth and final cause of action interposed alleged a claim for defamation. Jurisdiction of the Court was invoked pursuant to the ancillary and pendent jurisdiction.

On May 17, 1979, petitioner moved before the District Court for a preliminary injunction and temporary restraining order. Respondents moved to dismiss the complaint. By decision and order of the District Court (Honorable James T. Foley), respondents' motion to dismiss as to the civil rights, medicare and state pendent claims was granted and respondents' motion to dismiss as to the antitrust claims was denied. Petitioner's motion for preliminary injunctive relief was denied. The only claims remaining in action constituted petitioner's antitrust claims.

On August 7, 1979, respondents' Anesthesia Associates of Plattsburgh, P.C. and John Menustik, M.D. filed their answer to the complaint. On August 13, 1979, respondents' Champlain Valley Physicians Hospital Medical Center, David T. Hannan, Michael J. Moynihan, M.D. and Salem Bayoumy, M.D. filed their answer.

On September 7, 1982, subsequent to discovery, respondents moved to dismiss petitioner's remaining antitrust claims on the basis of lack of jurisdiction. On October 29, 1982, petitioner moved before the District Court for partial summary judgment with respect to her Section 1 claims. The District Court (Honorable Roger J. Miner), consolidated both motions for hearing on November 19, 1982. By decision and order of the District Court, (Honorable Roger J. Miner) dated February 28, 1983 (officially reported at 561 F.Supp. 700), respondents' motion to dismiss was denied and the Court specifically held that jurisdiction was present for petitioner's antitrust claims. As to petitioner's motion for partial summary judgment, the District Court found that several triable issues of fact existed and accordingly denied said motion. This decision of the District Court was rendered during the fourth week of the actual trial of this action.

This action was tried between February 8, 1983 and March 3, 1983. At the close of petitioner's proof, all of the respondents moved for a directed verdict. The Court reserved decision and directed the respondents to proceed. At the close of all of the evidence, respondents made a motion for directed verdict. Furthermore, at the close of all of the evidence, petitioner moved to amend her complaint to conform to the proof adduced during trial and moved for a directed verdict. The District Court granted petitioner's motion to amend her complaint to conform to the proof. Further, the District Court (Honorable Roger J. Miner), on March 2, 1983, denied respondents' motion for a directed verdict at the close of petitioner's case; granted respondents' motion for directed verdict at the close of all of the evidence; and denied petitioner's motion for directed verdict at the close of all the evidence. Judgment was accordingly entered on the decision. Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed the District Court.

Facts.

Louise Konik is a physician duly licensed to practice medicine in the State of New York. She has held her license since the year 1958 and her medical specialty is that of anesthesiology (R.302a-306a).[2] Louise Konik is married to Nicholas Scors, who is also a physician duly licensed to practice medicine in the State of New York in the medical specialty of surgery (R.303a-305a). In 1960, Dr. Konik and her husband moved upstate to Plattsburgh and obtained privileges at the predecessor of respondent, Champlain Valley Physicians Hospital Medical Center ("CVPH") (R.307a-310a). Dr. Konik was granted full privileges in anesthesiology on January 1, 1961 and her

[2]The following references will be used herein:

App.—Appendices to this petition
R-a—Record in appendix to appellant's brief in Court below.

husband obtained full privileges in surgery at the same hospital (R.309a-310a). Dr. Konik and her husband have maintained full privileges at CVPH to this date, continuously since 1961 (R.316a, 451a, 466a). Since 1960, Dr. Konik has practiced medicine full time at CVPH as a member of its medical staff and member of its Department of Anesthesiology. From the date of her staff affiliation with CVPH, Dr. Konik has not been a staff member of any other hospital (R.491a).

CVPH Medical Center is a regional hospital[3] occupying a thirty-six acre campus of facilities located in Northeastern New York in the County of Clinton.[4] The CVPH

[3]Scattered throughout the tri-county area of Clinton, Essex and Franklin are six community hospitals with bed size ranging from 30 to approximately 100 beds (R.1033a-1043a), the closest hospital being approximately 50 miles from CVPH and the farthest approximately 80 miles (R.1915a; 1916a). Only a few of these community hospitals are equipped to perform surgery, however, they are capable of handling only minor, simple operations on a small scale (R.1986a-1987a; 2010a). As a result, these community hospitals require minimum anesthesia services. Because these hospitals are limited facilities, they refer all of their complex and excess surgeries to CVPH due to its size and location, and the reputation, size and expertise of its medical staff (R.1901a).

[4]CVPH is an essential facility for the provision of anesthesia services. It is a 430 bed medical center (R.966a); the only hospital located in rural Clinton County, New York (R.1915a); maintains several facilities situated on a 36 acre campus (R.970a); has 1,200 employees (R.968a); has 29 departments, 22 of which are medical (R.967a); has a $20,000,000.00 budget (R.968a); provides primary, secondary and tertiary medical care (R.968a-969a); maintains teaching programs for nurses, radiological technologists, laboratory assistants (R.970a); conducts graduate and post graduate teaching programs for medical students and physicians of the University of Vermont Medical School (R.970a-972a); has a medical staff of 90 physicians (R.1660a; 1892a); is a regional hospital (R.956a); contains a 54 bed nursing facility (R.956a); provides rehabilitative services; including physician, occupational, speech and recreational therapy (R.956a); performs approximately 8,000 operations on a yearly basis (R.956a); maintains a 14 bed intensive care unit (R.956a); maintains a 7 bed coronary unit (R.957a); maintains a 22 bed mental health unit (R.957a); and sponsors lectures, teaching days and symposiums for health care professionals throughout the region (R.957a). (See also, R.1892a).

Medical Center is the result of the merger of Champlain Valley Hospital and the Physicians Hospital, both located at Plattsburgh, New York in 1968 (R.334a-335a). CVPH possessed substantial "market power" in excess of ninety-five percent.[5]

Dr. Konik was never an employee of CVPH or its predecessor. Through the 1960's, she practiced in her solo capacity and then later as a member of a group of anesthesiologists all of whom maintain staff privileges solely at CVPH and were members of its Department of Anesthesiology (R.316a-344a). In 1970, she became the only female physician member of a partnership known as Anesthesia Associates, the predecessor of respondent Anesthesia Associates of Plattsburgh, P.C. ("AAP") (R.345a-348a). Again, the partners were all staff members of CVPH and its Department of Anesthesiology. Dr. Konik continued to practice as a member of the partnership until 1973 when respondent, AAP, was incorporated (R.345a-348a). The physician members of AAP were originally Dr. Konik, Dr. John Menustik, Dr. Mauricio Leon, Dr. John Rury and later during 1976, Dr. Salem Bayoumy was admitted (R.348a, 361a).

The medical competence of Dr. Konik has never been questioned nor has it been raised as an issue by any party in this action. In fact, all parties and witnesses have noted

[5]The relevant geographic market of Clinton County is not disputed (R.1207a-1222a; 1234a-1235a). This is acknowledged by the Court below. Dr. Murray, an econometrician, testified that on the basis of empirical studies of data, prepared and compiled by CVPH and filed with the New York State Department of Health, that approximately ninety-nine (99%) percent of the patients within the relevant geographic market go to CVPH for surgical procedures (R.121a; 1198a-1231a). This finding was buttressed by the independent testimony of Paul Fitzpatrick, Director of Health Systems Review, of the Health Systems Agency of Northeastern New York (R.1482a; 1473a-1487a) (See also, R.1940a; 1942a; 2009a-2014a; 1915a; 1916a). This proof stands unrefuted by respondents.

her medical excellence (R.467a-472a; 850a-851a; 923a; 998a-1002a; 1017a-1018a; 2319a).

On May 9, 1978, Dr. Konik tendered her resignation to AAP effective August 9, 1978 (R.346a-368a). Dr. Konik elected to resign from the respondent AAP because of the lack of harmony and cooperation among the physician members of the professional corporation (R.368a). She resigned with the express and disclosed intent to continue practicing her profession in an independent, solo capacity as a member of the general medical staff and the Department of Anesthesiology (R.368a-479a). Immediately after her letter of resignation, Dr. Konik stated her intent to practice solo to the hospital administration and AAP (R.368a-379a). In June of 1978, the hospital administration in concert with AAP determined not to accommodate her wishes to practice solo (R.1919a). One week later, pursuant to the decision of the governing board of CVPH, an internal memorandum was issued which denied Dr. Konik's access to patients, cases and the operating room after the 9th day of August, 1978 (R.1921a, 1054a-1057a). During the month of July, 1978, at a meeting of all of the members of the general medical staff, attended by ninety physicians, a motion was made to allow Dr. Konik to practice her specialty as a staff member notwithstanding her resignation from AAP. The motion was carried overwhelmingly by a vote of eighty-seven in favor and three opposed (R.1662a, 379a-385a). As August 9, 1978 approached, it was determined among the parties to allow Dr. Konik to continue practicing her profession as a staff and department member, in a solo capacity, until September 1, 1978 (R.1663a-1664a). Dr. Konik practiced for three weeks along side of AAP delivering anesthesia with no disruption or interruption in service and took her cases and assignments from the Chief of the Department of Anesthesiology (R.386a-393a; 791a-793a; 1058a-1059a; 1119a-1125a).

During this three week period, CVPH and AAP entered into negotiations for a contract with respect to the delivery of anesthesia. On August 31, 1978, a contract was entered into by and between CVPH and AAP (App. C. 61c-65c). Dr. Konik's name was added to said contract as a third-party, for purposes of excluding competing anesthesiologists and avoiding litigation (R.1551a-1561a). Concurrently, during this three week period, the minutes of the corporate meetings of AAP revealed that the intent of the contract was not to accommodate Dr. Konik, but to achieve an exclusionary benefit and an exclusive franchise for AAP (R.1551a-1561a). On September 1, 1978, the contract was presented to Dr. Konik for her signature, after respondents, CVPH and AAP had executed same. Dr. Konik rejected the contract upon the grounds that it was exclusive and that it excluded future competing anesthesiologists, contained a price fixing provision and contained provisions which enabled respondent AAP to control her solo practice (R.397a-404a).

As a result of petitioner's unwillingness to sign the contract, she was denied access to the operating room after September 1, 1978 notwithstanding her status as a member of the staff in good standing. Furthermore, all patient and surgeon requests for her professional services were denied (R.396a; 415a-425a; 978a-979a; 993a-996a; 1011a-1012a; 2298a-2299a; 2330a). Having been barred from the surgical suites of CVPH for four weeks, petitioner in an effort to preserve her practice, on September 29, 1978, signed a counter proposal of the contract containing an express waiver provision which preserved all of her rights against the respondents, CVPH and AAP, to challenge the legality of the document. CVPH and AAP refused to execute same (R.426a-430a; 688a; 683a; 686a; 689a).

From the date of petitioner's rejection of the contract, September 1, 1978, to date, she has continuously been denied access to the CVPH operating rooms, patients and cases, despite surgeon requests and the deterioration of patient care (R.393a; 414a-415a; 434a; 746a-747a; 811a; 1001a-1002a; 1075a-1077a; 1098a-1099a; 1159a-1160a; 1372a-1373a). Since 1978, petitioner has been reappointed to the staff on a yearly basis with full, senior privileges in anesthesiology (R.445a-451a). Since 1978, petitioner has regularly attended general staff meetings of CVPH and the monthly meetings of the Department of Anesthesiology. At said staff and department meetings, petitioner has repeatedly voiced her availability and willingness to deliver anesthesia as a staff and department member (R.430a-432a; 454a-456a). The response of the respondents has been consistent in that petitioner must execute the contract of August 31, 1978 to regain access to patients, cases and the surgical suites (R.1076a-1077a). This is the first and only occasion in the history of CVPH and its predecessor that a physician staff member has been denied access to the use of the hospital facilities (R.746a-747a).

The contract of August 31, 1978 continues to remain in effect. As a result, respondent AAP is and has been the exclusive provider of anesthesia to CVPH and competition that would be provided by petitioner and other anesthesiologists but for the contract has been foreclosed (R.758a-760a; 989a-991a; 1009a-1010a; 2381a). Since September 1, 1978, no physician other than a member or employee of AAP, has delivered anesthesia at CVPH in a solo capacity.

Reasons for Granting Writ.

The Sherman Act, its statutory history and the Court decisions construing and applying it unequivocally stand

for the proposition that a competitor, in combination with a seller at another level of the market, cannot foreclose access to the market by another competitor by means of coercive trade practices. The decision below has emasculated the Act by announcing the dubious proposition that access to the marketplace by a competitor may be conditioned by coercive trade practices and illegal anti-competitive conduct. It is respectfully submitted that the decision below is unprecedented and erroneous in the following respects:

1. This is the first time it has been held that a competitor may be excluded from the market unless there is acquiscence to an illegal price-fixing agreement between a group of competitors and a seller with undisputed market power.

2. The decision below undercuts in several fundamental ways the roots established in the health care field by this Court in the *Hyde* and *Maricopa* cases by straining to uphold a directed verdict and both legitimizing and leaving intact a maximum price-fixing agreement and a group boycott. An agreement, had the petitioner executed, would have become a horizontal price-fixing agreement among competitors.

3. The decision of the Court below is in total conflict with the decisions of this Court which have stood for the proposition that an arrangement which has as its primary purpose or effect the exclusion of a competitor from the market is prohibited by the Act. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

4. This case answers the questions left open by this Court in *Hyde*. The undisputed market conditions presented in this case provide the record lacking in *Hyde*.

5. The decision below condones an illegal vertical maximum price-fixing agreement by not providing the injunctive relief prayed for.

6. The decision below provides an unprecedented and dangerous signal to the health care industry on doctrinal issues regarding exclusion of competition and price-fixing in the expanding use of service contracts.

It is respectfully submitted that the dubious propositions established by the decision below are injurious in their potential effect on the health care industry and that it is in the public interest that this Court review that decision.

ARGUMENT.

I.

The arrangement between the hospital and the firm of anesthesiologists constitutes a classic group boycott.

The Court below held that petitioner's group boycott claim failed because of the lack of evidence, or inference thereof, that the Contract[6] was exclusionary. This holding clearly overlooks long standing precedent of this Court as well as critical and compelling trial evidence.

[6]The agreement between CVPH and AAP dated August 31, 1978, annexed at App. C. 61c-65c.

Under *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission,* 312 U.S. 457 (1941), a finding that Dr. Konik was absolutely barred from the hospital is simply not necessary to establish an unlawful group boycott. An arrangement is not saved from *per se* condemnation if the refusal to deal, while not absolute, is designed to influence coercively the trade practices of the boycott victim.[7]

The coercion of petitioner is repeatedly demonstrated in the trial record. Since September 1, 1978, Dr. Konik's access to the operating rooms, patients and cases at CVPH has been conditioned solely on her execution of the Contract (R.393a; 414a-415a; 434a; 746a-747a; 811a; 1001a-1002a; 1075a-1077a; 1098a-1099a; 1159a-1163a; 1372a-1373a).[8] Also, prospective anesthesiologists, Drs.

[7]See also, *Associated Press v. United States*, 326 U.S. 1 (1945) (condemning news service bylaw permitting a member to block the membership application of a competitor); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943) (conspiracy, *inter alia*, to deny hospital staff privileges to physicians pursuing disfavored financial mode of practice); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Silver v. New York Stock Exchange*, 373 U.S. 341, 361-367 (1963) (fair hearing must precede exclusion of competitors); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (third party payer requirement that psychologist services to be billed through a physician constituted boycott of independent psychologists).

[8]"The Clerk: Plaintiff's Exhibit 74 marked in evidence.

Mr. Costello: With the Court's permission, please, thank you. This is a letter, original letter dated January 24th from Mr. Hannan, President of the Medical Center, addressed to Louise Konik, M.D.:

> "Dear Dr. Konik, I acknowledge receipt of your letter of January 17, 1979. We are aware of your availability. You have repeatedly been advised that the medical center will avail itself of your services and make available to you the facilities of the Anesthesia Department at any time that you acknowledge in writing your willingness to adhere to the conditions governing the provision of service as endorsed in

(Footnote continued on following page.)

Pang[9] and Modak,[10] had their access to the hospital similarly conditioned.

(Footnote continued.)

writing by the anesthesiologists now providing medical center services. Please find this understanding attached. Sincerely yours, David T. Hannan, President." And attached to the letter is a copy of the contract between the medical center and the corporation dated August 31, '78, and it is signed by the hospital by Mr. Hannan and by the corporation by Dr. Menustik, which is unsigned by my client.

Q. Now, Mr. Hannan, today is February 17, 1983. Does the same condition apply? A. Today?

Q. Yes, sir. A. Yes, it does" (R.1076a, 1077a).

[9]Mr. Hannan, President of CVPH, testified that Dr. Pang would have to sign the same contract that was required of Dr. Konik as a condition to practice at CVPH (R.1378a-1380a; 1747a). The corporate meeting minutes of AAP for April 2, 1981 states:

"*Dr. Bayoumy*: stated we will give Dr. Pang his fair share of the cases if he chooses to leave the corporation. There will be six second call days and six first call days for each Dr. and he will have to take both calls because he will not be a member of the corporation. He still has to abide by the rules of the corporation.

Dr. Pang: . . . Dr. Pang asks if he wants to go solo now he can and Dr. Rury states he will breach his contract if he leaves now. If he stays solo Dr. Menustik stated he will still have to take rotation call and vacation time the same as before, while with the P.C." (R.1575a).

Dr. Pang did not sign the contract and did not practice solo at CVPH. His reluctance to do so is based upon the realities of the situation, viz., AAP retaining control and influence over his practice.

"And did you discuss with any members of the P.C. about you going solo at the hospital?
Dr. Bayoumy, he know about it. I told him about it.
What did he say to you?
He just—he told me if you want to stay here, you know, do practice solo. He—he didn't say any—he just say I could—he thinks I probably do a solo practice. It's up to

(Footnote continued on next page.)

Paragraph 3(c) of the Contract provides:

> "Fees charged by the parties of the second [AAP] and third [Konik] part shall be no greater than those charged by other anesthesiologists for similar work situations in upstate New York" (App. C. 64c).

Relying upon *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court below found that this term of the Contract constituted vertical price-fixing. Notwithstanding the illegality of the Contract, the Court below sanctioned the right of the hospital and the firm of anesthesiologists to condition petitioner's access to the operating

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(Footnote continued.)

> him. Because he's chairman. He assign the cases. Right? He didn't assign me. Sometimes he put me on small numbers case, then I'm lost. Right? I couldn't make any money like that" (R.1534a).

[10]Dr. Modak's unrefuted testimony was that after having received the encouragement of the staff surgeons at CVPH, the Chief of Staff, Dr. Moynihan, directed him to obtain an application from the administration (R.1116a-1117a). Dr. Modak testified that he was provided an application by an administrator and told to first check with the Chief of the Department of Anesthesiology, Dr. Bayoumy (R.1117a). Dr. Modak testified that in his discussions with the surgeons of CVPH, its Chief of Staff, and the administration, that his intent and desire was to obtain privileges at CVPH and practice as an independent, solo anesthesiologist (R.1115a-1121a). Dr. Modak testified that when he met with Dr. Bayoumy, Chief of the Department of Anesthesiology, and a member of AAP, that he advised him also of his intent and desire to practice solo. He further stated to Dr. Bayoumy that the surgeons he has interviewed with, as well as the Chief of Staff, indicated that there was a need for another anesthesiologist (R.1118a). Dr. Modak's uncontroverted trial testimony was that Dr. Bayoumy told him that if he (Dr. Modak) wanted to practice at CVPH he must join the professional corporation and that he could not practice in a solo capacity (R.1118a; 1135a; 1161a-1162a).

rooms, patients and cases solely upon the execution of the document. This treatment of the facts is clearly erroneous as a matter of law.

Moreover, the Court below ignores trial evidence which manifested the actual purpose, design and intent of the Contract. The corporate meeting minutes of AAP, each of which were reviewed, approved and signed by a physician member of the firm (R.292a-293a), clearly demonstrate the motive of the respondents in executing the Contract. The minutes of August 31, 1978, the date of the execution of the Contract are unequivocal:

> "*Dr. Leon*: My idea is, do you believe the Hospital and Corporation can have a contract. Mr. Fitzpatrick [legal counsel for the group]: Yes, if you use the contract and leave Dr. Konik out but there will be litigation between both parties. This would open it up for someone else to come in on their own if we do not have an agreement with Dr. Konik" (R.1560a).

The minutes of August 23, 1978 and August 29, 1978, reveal the objective to coercively influence the practice of petitioner as a competitor. On August 23, 1978, the following was stated:

> "*Dr. Bayoumy* asks: If Dr. Konik could bring someone else in with her, Mr. FitzPatrick states no, the Contract would be in effect only with her (Dr. Konik) . . ."

> "*Mr. FitzPatrick* states: . . . that there are two alternatives, (1) either she contracts with the group to help on a specific percentage basis like she is now and continue to do her own billing, or (2) she can become an associate member of the group by con-

tract with the corporation and the hospital and share the franchise . . ."

"*Dr. Menustik* states: If corporation does not go with the Contract there could be a lawsuit and corporation would be right back where we started ten years ago" (R.1551a).

The August 29, 1978 minutes reflect the following:

"*Dr. Bayoumy*: . . . Dr. Bayoumy states Dr. Menustik made a good point in reference to 90 day cancellation of contract by any party—a new group could be brought in and given the franchise . . .

"*Dr. Bayoumy*: . . . It is very easy for someone to leave the group and go out on their own and get everything they want therefore he wants a Contract with the hospital for the corporation . . .

Dr. Menustik: States that if Dr. Konik gets away with doing this, the next time someone leaves, they in turn can do anything they want to . . .

Dr. Leon: . . . if a Contract is signed with the hospital anyone that has a desire to leave or a new party come in, they will have to go through the corporation. There is no way Dr. Konik can bring anyone else in with her" (R.1555a).

The trial record unequivocally establishes that the Contract and the arrangement between CVPH and AAP had as its necessary tendency as well as its purpose and effect, the direct control and coercive influence over the practice of any competing anesthesiologist, including petitioner. The noble justifications advanced by respondents at trial and the Court below, viz., 24 hour coverage, vacations, scheduling, quality of patient care, etc., necessitating the

Contract have been rejected by this Court as a justification for what is inherently a violation of the antitrust laws.[11] These concerns could adequately be addressed by way of rules, regulations, medical by-laws, and staff privileges.[12] The net effect of this contractual arrangement is that competition with AAP is suppressed unless competitors knuckle under and capitulate to price-fixing and the coercive control of their practice by AAP. The antitrust significance of the subject contractual arrangement is heightened because of the hospital's market power.[13]

POINT II.

The arrangement between the hospital and the firm of anesthesiologists constitutes an illegal tying arrangement.

The Court below misperceives and missapplies the recent holding of this Court in *Hyde*. The Court below held that petitioner's illegal tying arrangement claim failed because of the absence of an exclusive dealing arrangement between CVPH and AAP, which was characterized

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[11]See, *Jefferson Parish Hospital District No. 2, et al v. Hyde*, ____ U.S. ____, 104 S.Ct. 1551 (1984), footnote 42. Indeed the facts adduced at trial refute the very existence of such justification. The trial evidence strikingly reveals that the quality of anesthesia services dramatically deteriorated at CVPH since the inception of the Contract, September 1, 1978 (R.880a-885a; 1007a-1008a; 983a-988a; 1153a-1158a; 1183a-1190a; 1148a-1149a; 1748a; 1870a; 1871a; 1936a; 1938a; 2260a; 2262a; 2265a; 2267a; 2269a).

[12]Dr. Menustik testified that continuous anesthesia service would be provided under the rules and regulations of the Department of Anesthesiology of CVPH notwithstanding the Contract (R.776a-778a). Furthermore, petitioner's expert, Dr. Hicks, testified that the rules and regulations of the CVPH Department of Anesthesiology were adequate to provide continuous coverage (R.1449a-1453a). This would enable CVPH to meet its anesthesia needs in a less restrictive manner.

[13]Refer to Point II, *infra*.

as the tie element. Clearly, the Circuit Court improperly limited its focus to the Contract itself. This Court in *Hyde* specifically stated ". . . our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiology services."[14]

The tie element is presented in this case, as in *Hyde*, through an analysis of the totality of the circumstances. When the intent, design, implementation and operation of the Contract and the conduct of the parties is examined, it is abundantly clear that the hospital's operating rooms are tied to the use of the anesthesiologists under the Contract.[15]

Once the tie element is established, the pivitol issue becomes the evaluation of the "market power" of CVPH to determine whether patients are forced to obtain anesthesia services from one source and thus whether in the delivery of anesthesia services competition has been suppressed by the arrangement. The anticompetitive consequences of the present arrangement are precipitated by the unique conditions of the hospital[16] and the market.[17] Unrefuted trial evidence established that CVPH possessed substantial "market power" in excess of ninety-five percent to force its patients to purchase AAP's services.[18]

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[14]*Hyde supra* at 1561.
[15]Refer to discussion at Point I, *supra*.
[16]See, footnote 4.
[17]See, footnote 3.
[18]See, footnote 5.

POINT III.

The Court below condoned an odious antitrust offense by finding illegal price fixing and refusing to grant the injunctive relief prayed for.

The first cause of action of the complaint sets forth the Federal Antitrust claims (R.13a-28a). Paragraph Twenty-seven of the complaint recites that the antitrust claims asserted arise ". . . under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1, 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15 and 26. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1337 and by 28 U.S.C. Section 1331, the amount of money in controversy exceeding Ten Thousand Dollars exclusive of interest, costs and punitive damages" (R.19a-20a). The requested relief under the first cause of action dealing with antitrust claims, seeks injunctive relief pursuant to Section 16 of the Clayton Act (R.28a).

To be entitled to injunctive relief, pursuant to Section 16 of the Clayton Act, petitioner need not have sustained or demonstrated injury to business or property. Petitioner need only demonstrate "threatened loss or damage by violation of the antitrust laws." See, *Hawaii v. Standard Oil Co.*, 431 F.2d 1282, 1284-1285 (9th Cir. 1970), aff'd, 405 U.S. 251, (1972). It is undisputed that petitioner has demonstrated "threatened loss" as evidenced by the fact that Dr. Konik is denied the right to obtain access to the surgical suites of CVPH to practice her profession, notwithstanding her staff privileges, unless and until she signs the Contract in existence between the hospital and AAP containing the illegal price-fixing provision (see, R.393a; 414a-415a; 434a; 746a-747a; 811a; 1001a-1002a; 1075a-1077a; 1098a-1099a; 1159a-1163a; 1372a-1373a).

Having held that the agreement constituted a vertical price-fixing scheme, the Court below permits the continuation and perpetuation of this odious antitrust violation by not granting appropriate injunctive relief. Accordingly, Dr. Konik should be granted injunctive relief enjoining the hospital and AAP from insisting that she sign the Contract, containing the illegal price-fixing provision, in order to gain access to the hospital to practice her profession.

POINT IV.

The Court below misapplied its standard for a directed verdict by means of overreaching.

Although correctly identifying the standard to review a directed verdict, the Court below improperly applied same.[19] The Court consistently refused to resolve favorably to petitioner all reasonable inferences and issues of credibility.

Petitioner's price-fixing claim presents the first example of the Court's errant application of this standard. The absence of antitrust injury was the sole basis for denying relief. The Court found that petitioner, by including a pricing provision in her counter proposal, made approximately four weeks after the subject Contract of August 31, 1978, presented adverse inferences and negative credibility thereby concluding that her exclusion was unrelated

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[19] *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976); *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943); *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir. 1970), cert. denied, 400 U.S. 833 (1970); *O'Connor v. Pennsylvania Railroad Co.*, 308 F.2d 911, 914 (2d Cir. 1962); *Schwimmer v. Sony Corp.*, 677 F.2d 946, 951-52 (2d Cir. 1982), cert. denied, 103 S.Ct. 362 (1982).

to price-fixing. The Court below completely overlooks petitioner's testimony which succinctly states that her counter-proposal was delivered to the respondents four weeks after she had been barred from entering the surgical suites and practicing her profession as well as four weeks of having been unable to professionally serve various patients and surgeons requesting her services (R.426a-430a; 680a; 686a-689a). With respect to the petitioner's counter-proposal, the Court below in an incredulous manner seeks to interpret the reservation-of-right clause[20] in petitioner's proposal in the most unfavorable light and draws a negative inference against petitioner's credibility on the basis of a lay person's interpretation and understanding of a legal provision in the Contract. Furthermore, the Court below fails to give any weight whatsoever to the direct testimony of the petitioner that she refused to sign the Contract because of her protest of the inclusion of a price-fixing provision (R.397a-401a).

Furthermore, facts adduced at trial compel the inference that respondents' actions were coercive and anti-competitive. The Court below fails to draw favorable inferences of coercion from the corporate minutes of respondent AAP, i.e. ". . . if a contract is signed with the hospital anyone that has a desire to leave or a new party comes in, they will have to go through the corporation. There is no way Dr. Konik can bring anyone else in with her;"[21] "It is very easy for someone to leave the group and go out on their own and get everything they want therefore he [Dr. Bayoumy] wants a contract with the hospital for the corporation;"[22] "State that if Dr. Konik gets away with doing this, the next time someone leaves, they in turn

[20]"6. The execution of this Memorandum of Understanding shall not be deemed a waiver of any cause of action of the party of the third part [Konik] heretofore existing against any other party to this Agreement" (R.1718a).

[21]R.1555a.

[22]R.1555a.

can do anything they want to;"[23] "There are two alternatives, (1) either she [Dr. Konik] contracts with the group to help on a specific percentage basis like she is now and continue to do her own billing, or (2) she can become an associate member of the group by contract with the corporation and the hospital and share the franchise;"[24] "Dr. Bayoumy stated he would give Dr. Pang his fair share of the cases if he chooses to leave the corporation. There will be six second call days and six first call days for each doctor and he will have to take both calls because he will not be a member of the corporation. He still has to abide by the rules of the corporation."[25] The Court below through a strained effort gives no weight or credibility to the testimony of Dr. Modak concerning his refusal to become affiliated with CVPH.[26] The exclusion of Dr. Pang is similarly treated by the Court below by failing to provide any favorable inference of coercion or credibility.[27]

The most egregious failure of the standard is presented when the Court below not only draws a negative but a harmful inference against petitioner when it infers certain findings which do not exist factually anywhere in the trial record. The Court upon no basis whatsoever concludes that petitioner's husband, as a surgical staff member of the hospital, would assign favorable, convenient and profitable cases to her as a staff anesthesiologist. This demonstrates a determined and strained effort by the Court below to create negative inferences and adverse credibility decisions against the petitioner.

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[23]R.1555a.
[24]R.1551a.
[25]R.1575a.
[26]See, footnote 10.
[27]See, footnote 9.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 20, 1984

EDITOR'S NOTE

PAGES 1a thru end WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A.

Opinion of the United States Court of Appeals for the Second Circuit.

KONIK v. CHAMPLAIN VALLEY PHYSICIANS HOSP.
Cite as 733 F.2d 1007 (1984)

Louise KONIK, M.D.,
Plaintiff-Appellant,

v.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, Anesthesia Associates of Plattsburgh, P.C., David T. Hannan, as President of Champlain Valley Physicians Hospital, and individually; Michael J. Moynihan, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, and individually; Salem Bayoumy, M.D. as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and individually; and John Menustik, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., and individually, Defendants-Appellees.

No. 65, Docket 83-7191.

United States Court of Appeals,
Second Circuit.

Argued Sept. 1, 1983.

Decided April 25, 1984.

Anesthesiologist brought action for declaratory, injunctive, and monetary relief against hospital, professional corporation

for practice of anesthesiology, and officials of such entities, seeking recovery under the Sherman and Clayton Anti-Trust Acts, Civil Rights Act, and Medicare Act. After grant of defendants' motion to dismiss various claims, defendants moved to dismiss antitrust claims. The United States District Court for the Northern District of New York, Roger J. Miner, J., 561 F.Supp. 700, dismissed antitrust complaint, and plaintiff appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) proposed three-way contract between hospital, professional corporation, and plaintiff did not have effect of excluding, in antitrust sense, plaintiff or any other anesthesiologists who were not members of the corporation, from rendering services at the hospital; (2) contract did not constitute unlawful tying arrangement, nor did it give rise to unlawful boycott or monopolization of market for anesthesiological services in county; and (3) though provisions in contract that fees charged by anesthesiologists were to be greater than those charged by others for similar work situations in other part of state constituted evidence of contractual vertical price restraint, plaintiff's claimed injury was not caused by that violation.

Affirmed.

1. Federal Civil Procedure ⇐2127

In ruling on motion for directed verdict, trial court must determine whether the evidence, viewed in light most favor-

able to nonmoving party, is sufficient to allow reasonable juror to arrive at verdict in latter's favor and, in making that determination, all reasonable inferences must be drawn in favor of nonmoving party and all questions of credibility likewise decided in his favor.

2. **Federal Civil Procedure ⇐2142**

If, on motion for directed verdict, trial court concludes that jury could not rationally find in favor of nonmoving party, it may properly grant motion.

3. **Federal Civil Procedure ⇐2601**

Preference of use of judgment notwithstanding the verdict over rulings on motions for directed verdict reflects fact that, if jury reaches what judge considers to be irrational verdict, judge may grant motion for judgment notwithstanding the verdict and, if that ruling is reversed on appeal, verdict may simply be reinstated; if, however, verdict has been directed and ruling is reversed on appeal, entire new trial must be held.

4. **Federal Courts ⇐798**

When the district court has granted directed verdict, Court of Appeals too must view evidence in light most favorable to nonmoving party, resolving all issues of credibility and drawing all reasonable inferences in his favor.

5. **Hospitals ⇐6**

Hospital has unquestioned right to exercise some control over identity and num-

ber of doctors to whom it accords staff privileges.

6. Monopolies ⇐12(11)

Proposed three-way contract between hospital, professional corporation for practice of anesthesiology, and individual anesthesiologist did not have effect of excluding, in antitrust sense, anesthesiologist in question, or any others who were not members of the professional corporation, from rendering services at hospital, but in fact expressly provided for nonmembers to render services, though in accordance with conditions and obligations imposed by hospital upon members. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Monopolies ⇐17(2.5)

Tying arrangement may be per se unlawful if there are two separate products or services, there is sale or agreement to sell one such product or service (the "tying product") conditioned on purchase of the other (the "tied product"), seller has sufficient economic power in market for tying product to enable it to restrain trade in market for the tied product, and arrangement affects a not insubstantial amount of interstate commerce in market for the tied product. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐17(2.5)

Contract between hospital and professional corporation for practice of anesthesiology did not give rise to unlawful tie-in on

ground that hospital, with power over operating room facilities in county, had allegedly tied those facilities to anesthesiology services provided by the corporation, since patients wishing to undergo operations in the hospital were not forced to purchase their anesthesiology services from the professional corporation, but could purchase services from any person qualifying under hospital requirements for access to the hospital's operating rooms. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. **Monopolies** ⇐12(11)

Anesthesiologist's claim that hospital and professional corporation for practice of anesthesiology engaged in unlawful boycott and that corporation attempted and conspired to monopolize market for anesthesiology services in county would fail, being predicated upon erroneous construction of contract between the parties as an exclusive dealing device preventing anesthesiologist from rendering services at the hospital. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

10. **Monopolies** ⇐12(1)

Agreement in restraint of trade need not be carried out in order for section one of the Sherman Act to be violated. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. **Monopolies** ⇐12(11)

Though provision in contract between hospital and anesthesiologist that fees

charged by latter were to be no greater than those charged by other anesthesiologists for similar work situations in other part of state constituted evidence of contractual vertical price restraint, subject anesthesiologist's claimed injury was not caused by that violation; evidence overwhelmingly showed that presence of the price ceiling was not reason for anesthesiologist's declining to enter into the contract. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15.

Michael L. Costello, Albany, N.Y. (David A. Ruffo, Tobin & Dempf, Albany, N.Y., on brief), for plaintiff-appellant.

Fitzpatrick, Bennett, Trombley, Lennon & Owens, P.C., Plattsburgh, N.Y., for defendants-appellees Champlain Valley Physicians Hosp. Medical Cent., David T. Hanman, Michael J. Moynihan and Salem Bayoumy.

Susanna L. Fisch, Albany, N.Y. (James S. Carter, Carter, Conboy, Bardwell, Case & Blackmore, Albany, N.Y., on brief), for defendants-appellees John Menustik and Anesthesia Associates of Plattsburgh, P.C.

For purposes of historical discussion, we use "Hospital" also to include institutions that were

Squire, Sanders & Dempsey, Washington, D.C. (Michael Scott, Rickard F. Pfizenmayer, Timothy W. Bergin, Washington, D.C., on brief), for amicus curiae

The American Soc. of Anesthesiologists, Inc.

Before KEARSE, CARDAMONE and WINTER, Circuit Judges.

KEARSE, Circuit Judge:

Plaintiff Louise Konik, M.D., a physician whose speciality is anesthesiology, appeals from a final judgment of the United States District Court for the Northern District of New York, Roger J. Miner, *Judge*, dismissing her complaint under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), and § 4 of the Clayton Act, 15 U.S.C. § 15 (1982), which alleged, *inter alia*, that defendants Champlain Valley Physicians Hospital Medical Center and certain of its officials (collectively the "Hospital" [1]), and defendants Anesthesia Associates of Plattsburgh, P.C., and its president (collectively "AAP"), had, with respect to the provision of anesthesiology services in the Hospital, engaged in unlawful price-fixing (both vertical and horizontal), group boycott, tying, monopolization, and conspiracy and attempt to monopolize. Prior to trial, in an opinion reported at 561 F.Supp. 700 (N.D. N.Y.1983), the district court granted partial summary judgment in favor of defendants on Konik's claim that AAP and its members had engaged in horizontal price-fixing. On March 2, 1983, following a four-week trial, the district court granted defendants'

motion for a directed verdict with respect to Konik's remaining claims. *Id.* at 722–24. On appeal Konik claims principally that the trial evidence warranted a directed verdict in her favor rather than against her. For the reasons below, we conclude that the court properly dismissed Konik's claims, and we affirm the judgment.

the predecessors of the defendant Hospital.

I. BACKGROUND

The case concerns the rendering of anesthesiology services at the Hospital, which is located in the City of Plattsburgh, Clinton County, New York. Dr. Konik, a licensed anethesiologist, has been a member of the medical staff of the Hospital since 1961. Her professional competence is not disputed. The fundamental facts as they emerged at trial are as follows.

A. *Pre-1978 Arrangements*

Prior to 1961, the practice of anesthesiology at the Hospital had developed on an ad hoc basis, in cooperation with private surgeons who were members of the medical staff. A surgeon who was to perform an operation would schedule the procedure at the Hospital and engage an anesthesiologist who also had staff privileges at the Hospital. Similarly, emergency services were arranged for by the surgeon or obstretician responsible for the procedure requiring anesthesia. Patients or their insurers were billed directly by the anesthesiologist on a fee-for-service basis.

In the 1960's the methods were changed both for emergency services and for scheduled services. For emergency anesthesia, a new "call schedule routine" required each member of the anesthesiology department, on a rotating basis, to be "on call" for 24 hours, ready to perform services on 15 minutes' notice. In 1968 the method for handling scheduled surgery was changed from individual arrangements between surgeons and anesthesiologists to a "central booking" system. Using the new method, the surgeon scheduling a surgical procedure would notify a clerk at the hospital; if he requested a particular anesthesiologist, the request would be honored if feasible. When the scheduling surgeon did not request a particular anesthesiologist, the assignment would be made by the Chief of the Department of Anesthesiology.

In 1971, with the encouragement of the Hospital, the four anesthesiologists then on the staff of the Hospital, including Konik, formed a partnership; in 1973, the partnership was converted into a professional corporation, defendant AAP. Each of the four anesthesiologists associated with AAP was a shareholder and employee of the corporation. In 1977 a fifth anesthesiologist joined AAP; there were five until Konik resigned in 1978.

Although there was no formal contract between the Hospital and AAP giving AAP the exclusive right to provide anesthesiology services during this period, in fact all

physicians holding anesthesia staff privileges at the Hospital were either shareholders or employees of AAP. Assignments continued to be made as a departmental matter, by the Hospital's Chief of Anesthesiology. AAP both billed its patients and distributed its revenues independently of the Hospital.

B. *The 1978 Contract*

On May 9, 1978, because of a lack of harmony and cooperation among the shareholder/employees of AAP, Konik notified AAP of her withdrawal from the corporation 90 days thence. She thereafter informed AAP and the Hospital that she intended to continue to provide anesthesiology services at the Hospital. The Hospital administrators, however, notified operating room supervisors that after August 9, 1978, the effective date of Konik's resignation from AAP, Konik would not be permitted to provide such services at the Hospital. Thereafter, the Hospital's August 9 cutoff date was extended to September 1, and Konik continued, independently of AAP, to provide anesthesiology services at the Hospital until September 1, 1978.

In the meantime, AAP and the Hospital sought to negotiate with each other and with Konik an agreement covering the provision of anesthesiology services at the Hospital. Eventually, the Hospital and AAP entered an agreement dated August 31, 1978, entitled "Memorandum of Understanding" ("the Contract"), the text of

which is set forth in the district court's opinion, 561 F.Supp. at 720–22. As executed, the Contract, which is the focus of Konik's antitrust challenges, provided, in pertinent part, (1) that AAP would provide sufficient anesthesiology services to the Hospital to ensure (a) anesthesiology services on all scheduled matters, (b) emergency coverage in the operating room 24 hours a day, 365 days a year, on 15 minutes' notice, and (c) obstetrical anesthesiology services in the operating room or the delivery suite 24 hours a day, 365 days a year, on 15 minutes' notice; (2) that the fees charged by the anesthesiologists would be no greater than those charged by other anesthesiologists for similar work situations in upstate New York; and (3) that no more than ten vacation days would be taken by any anesthesiologist during June, July, and August without written agreement between the parties. The Contract recognized that AAP was an independent contractor and provided that it would render the required services either itself "or in conjunction with any others [t]hereafter admitted to the Medical Staff of [the Hospital]." The Contract provided that its terms and conditions were to be reviewed by the parties every six months.

Konik was invited to become a party to this Contract, which had been drafted as a tripartite agreement among the Hospital, AAP, and Konik. AAP was defined as the "party of the second part"; Konik was

defined as the "party of the third part"; and all provisions setting forth the rights, privileges, responsibilities, and undertakings of the anesthesiologists referred, without differentiation, to both the party of the second part and the party of the third part.

Konik declined to enter into the Contract. Instead, in a document dated September 29, 1978, she proffered to the Hospital and AAP a version of a contract ("Konik Proposal") that differed from the Contract in several material respects. Although it contained the same provisions for the amount of service to be ensured, and it too imposed the requirement that the fees charged not be higher than those charged by anesthesiologists in similar upstate New York situations, the Konik Proposal (1) provided that the Hospital would not permit any other anesthesiologist, including those thereafter admitted to the Hospital's medical staff, to use the Hospital's facilities without first agreeing to and executing an understanding as reflected in the Konik Proposal; (2) eliminated the provision that the contract "shall" be reviewed every six months and provided instead that it "may" be so reviewed, and further provided that unless all parties agreed in writing to a modification, the contract envisioned by the Konik Proposal would remain in effect; and (3) provided that up to 40 "operating room working days" could be taken off by

2. In addition to her antitrust claims, Konik asserted various other federal and state claims,

any anesthesiologist for vacations, holidays, or attendance at professional conferences, seminars, or courses, and that requests for such days off would be honored on a "first request made basis." The Konik Proposal provided that Konik's execution of the agreement was not to be deemed a waiver of any preexisting cause of action she might have against AAP or the Hospital. Konik signed the Konik Proposal and submitted it to AAP and the Hospital, both of which rejected it.

After September 1, 1978, the Hospital refused to allow Konik to provide anesthesiology services at the Hospital unless she signed the Contract. She did not sign it, and, although she has retained her senior staff privileges, she has not been allowed to provide anesthesiology services at the Hospital since that date.

C. *The Dismissals of Plaintiff's Claims*

Dr. Konik commenced the present lawsuit in 1979, seeking *inter alia*, treble damages under § 4 of the Clayton Act.[2] She contended that the Contract was an exclusive arrangement that violated § 1 of the Sherman Act by (1) having the Hospital boycott her, (2) allowing the members of AAP to fix maximum prices for anesthesiology services in Plattsburgh, (3) vertically fixing the prices to be charged to patients of the Hospital, and (4) allowing the Hospital to tie use of its operating facilities to the purchase of anesthesiology services from AAP. Konik contended also that de-

fendants had monopolized, and attempted and conspired to monopolize, the market

which were dismissed in 1979 and are not at issue on this appeal.

for anesthesiology services in Clinton County, in violation of § 2 of the Sherman Act.

On February 28, 1983, prior to trial, the district court summarily dismissed the claim that the AAP members had engaged in horizontal price fixing, ruling that as a professional corporation, AAP was a single seller of services, competing with others in the market. Accordingly, AAP's setting of the fees it would charge did not constitute a horizontal agreement. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356–57, 102 S.Ct. 2466, 2479–2480, 73 L.Ed.2d 48 (1982). The court denied defendants' motions to dismiss Konik's other antitrust claims, and those claims went to trial.

At the close of the trial evidence, both sides moved for a directed verdict. On March 2, 1983, in an opinion reported at 561 F.Supp. 722–24, the court denied Konik's motion and granted that of the defendants. The court stated that the premise of all of Konik's antitrust claims was that the Contract was an exclusive contract, *i.e.*, that it excluded Konik and others from the practice of anesthesiology at the Hospital. After all the evidence had been presented, the court found it overwhelmingly demonstrated that the Contract was nonexclusive,

since the document contemplated that other anesthesiologists might in the future be admitted to the Hospital staff and would provide anesthesiology services there, and since Konik herself had the option of either rejoining AAP or providing services to the Hospital independently subject to the terms of the Contract. The court, quoting *Epoch*

3. Although Konik argues in her brief on appeal that the court's earlier summary dismissal of the horizontal price-fixing claim was also improper, she has not taken an appeal from that ruling. Her notice of appeal stated only that she appealed

> from each and every part of the decision and order of the District Court (Honorable Roger J. Miner), rendered on the 2nd day of March, 1983 and entered in this action on the 3rd day of March, 1983: (1) In denying plaintiff's motion for directed verdict at the close of defendants' case; (2) Granting defendants' motion for directed verdict at the close of all the evidence, and (3) Plaintiff hereby appeals

Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 742–43 (2d Cir.1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1429, 47 L.Ed.2d 360 (1976), concluded that "reasonable men could not arrive at a contrary verdict." The court found that the nonexclusivity of the Contract defeated Konik's claims of boycott, tie-in, and § 2 violations.

The court went on to find that there was no evidence that AAP and the Hospital had conspired to fix prices vertically. The court found that the provision in the Contract that AAP would charge prices no higher than those charged in similar cir-

cumstances in other upstate New York communities was not in itself evidence of price-fixing.

Judgment was entered dismissing the complaint. Konik appeals from the court's March 2 rulings on the motions for directed verdict.

II. DISCUSSION

We have reviewed the trial record and we agree with the district court that a reasonable jury could not have found that the Contract between the Hospital and AAP was an exclusive dealing arrangement that excluded Konik. The proposition that Konik was excluded by that Contract was the linchpin of most of Konik's claims, and we conclude that the claims of boycott, tying, attempted monopolization, and conspiracy to monopolize were properly dismissed on this basis. As to the remaining claim that the defendants had entered into a vertical price-fixing arrangement,[3] we

from each and every part of said order as well as the whole thereof.

Thus, the correctness of the court's dismissal of the claim of horizontal price fixing is not before us. Were we to reach the issue, however, we would agree with the district court that AAP, as a professional corporation whose members had pooled their capital and shared the risk of loss as well as the opportunities for profit, was a "joint venture[ ] [to be] regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Medical Society, supra*, 457 U.S. at 356, 102 S.Ct. at 2480. Konik's

contention that there was no one with whom AAP, as a single seller, could compete was prop-

conclude that although there was evidence as to the existence of such an agreement, no rational jury could find that Konik had been injured by the agreement.

A. *The Nature of the Contract*

[1–3] It is well established that in ruling on a motion for a directed verdict, the trial court must determine whether the evidence, viewed in the light most favorable to the nonmoving party, is sufficient to allow a reasonable juror to arrive at a verdict in the latter's favor. *Brady v. Southern Railway Co.*, 320 U.S. 476, 479–80, 64 S.Ct. 232, 234–235, 88 L.Ed. 239 (1943); *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970). In making this determination, all reasonable inferences must be drawn in favor of the nonmoving party, and all questions of credibility must likewise be decided in his favor. *See, e.g., O'Connor v. Pennsylvania Railroad Co.*, 308 F.2d 911, 914 (2d Cir.1962); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2524–2528 (1971). If, within this framework, the court concludes that the jury could not rationally find in favor of the nonmoving party, it may properly grant the motion for a directed verdict.[4]

[4] Our function as a reviewing court is similar. When the district court has granted a directed verdict, we too must view the

evidence in the light most favorable to the nonmoving party, resolving all issues of

erly rejected. Obviously it could compete with Konik, who was not required to charge the same prices AAP charged; and the record was clear that there were other anesthesiologists who were potential entrants into the market.

4. We have in the past cautioned trial judges that it is preferable, "in the best interests of efficient judicial administration," to refrain from granting a motion for a directed verdict and instead to allow the case to be decided—at least in the first instance—by the jury. *E.g., Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 & n. 2 (2d Cir.1980). Pursuant to the recommended practice, if the jury reaches what the judge considers to be an irrational verdict, the judge may grant a motion for judgment notwithstanding the verdict. If this ruling is reversed on appeal, the jury's verdict may

credibility and drawing all reasonable inferences in his favor. *See Schwimmer v. Sony Corp.*, 677 F.2d 946, 951–52 (2d Cir. 1981), *cert. denied*, 459 U.S. 1007, 103 S.Ct. 362, 74 L.Ed.2d 398 (1982). Our review of the record in the present case convinces us that, even after drawing all permissible inferences and resolving any issue of credibility in Dr. Konik's favor, there was insufficient evidence from which the jury could rationally find that the defendants excluded or attempted to exclude Konik from the practice of anesthesiology at the Hospital.

It is clear that the terms of the Contract challenged by Konik did not exclude her. As set forth above, after Konik withdrew from AAP, the Contract was proposed as a three-way arrangement among the Hospi-

tal, AAP, and Konik, permitting Konik to practice independently of AAP. Konik was invited to become a party to the Contract on terms that in no way discriminated against her.[5] Defined as the "party of the third part," Konik was joined in lock-step with AAP, subject to precisely the same responsibilities and given precisely the same benefits as the anesthesiologists who were members of AAP. The Contract was the culmination of many weeks of negotiations directed toward accommodation of Konik's desire to practice anesthesiology at the Hospital without being a member of AAP. Had she signed the Contract, she would have been allowed to render anesthesiology services alongside the members of AAP. Plainly the terms of this nondiscrim-

simply be reinstated. If, however, a verdict has been directed and that ruling is reversed on appeal, an entire new trial must be held.

We repeat our advice here. The trial in the present case consumed nearly four weeks. Had it not been appropriate to affirm, the district court, the jurors, and the parties would have needlessly been put to the trouble of another four-week trial.

5. If the terms of a proposed agreement were discriminatory, *cf. Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), a substantial question would be presented for the jury as to whether or not the agreement was exclusionary. Here, however, as discussed in the text, the Contract bears none of the indicia of a discriminatory or exclusionary device.

inatory agreement cannot be the basis for a rational conclusion that she was excluded by the defendants.

Nor would the evidence support a finding that the terms of the Contract excluded all anesthesiologists other than Konik. The agreement explicitly contemplated that AAP would undertake to provide the required services not only along with Konik as a signatory of the Contract, but also "in conjunction with any others hereafter admitted to the Medical Staff of" the Hospital. Further, the Contract provided that its terms and conditions were to be reviewed by the parties every six months; it gave none of the three proposed signatories any power to perpetuate the arrangement over the objection of any other party. Thus, at the end of any six-month period the Hospital would be entirely free to contract with a provider of services other than AAP.

In arguing that the court erred in concluding that the Contract was not an exclusionary device, Konik relies principally on minutes of meetings of the AAP board of directors and on the testimony of two non-AAP anesthesiologists, Dr. Suk-Woon Pang and Dr. Agit Modak. We have reviewed this evidence and for the reasons below conclude that neither it nor the other evidence of record was sufficient to permit a jury to find that the Contract excluded Konik or others.

Konik quotes various excerpts of the AAP board minutes and argues that the statements of AAP members there reported reflect their intention to (1) "control and coercively influence her practice" (Konik

brief on appeal at 14), (2) exclude other anesthesiologists (*id.* at 13–14), and (3) avoid litigation (*id.* at 14). We find no antitrust merit on these contentions. Only the first two merit discussion.

It is evident from the record, as Konik suggests by her description of AAP as wishing to "control" her practice, that AAP did not wish to have her practice independently of AAP without her having an obligation to shoulder an aliquot share of the responsibilities. There is nothing anticompetitive, however, in the insistence, by a service group that undertakes to provide not only active service but in addition extensive standby service, on a contract with the purchaser whereby a competitor of the group is not allowed to pick and choose assignments in such a way as to reap the benefit of the group's commitment to extensive coverage without the competitor's having to undertake such obligations. There can be no doubt that the time-off provisions inserted in the Konik Proposal were of importance to Konik and reflected a matter of concern to AAP. Konik testified that over the years vacations had been a subject of disputes at AAP and that she had often complained that she wished to work less. Konik's proposal provided that an anesthesiologist could take off 40 working days, with requests for such time off to be honored on a first-request-received basis. Konik's husband was a surgeon on the staff of the Hospital, and nonemergency

surgery was normally scheduled six months in advance. No doubt AAP had visions of Konik's husband's requesting Konik's services as an anesthesiologist, thereby ensuring that she could earn fees at times convenient to her and her family, and that this, together with Konik's expanded provision for time off and her ability to make early requests for such time, would enable Konik to avoid much of the less profitable coverage responsibility undertaken by AAP. Such a possibility is not an inappropriate business concern, and antitrust analysis takes into account that some arrangements may be necessary in order to remedy "market imperfections such as the so-called 'free rider' effect." *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55, 97 S.Ct. 2549, 2560, 53 L.Ed.2d 568 (1977).

[5] Further, the fact that AAP sought a contract to prevent the rendering of service by another group of anesthesiologists does not mean that the agreement eventually entered into was exclusionary in the antitrust sense. As a practical matter, every contract excludes, at least to some degree, those who are not parties to it. *See, e.g., Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.") Indeed, it is the nature of competition that at some point there are

winners and losers, and the losers are excluded. Plainly the Hospital is not required to open its operating rooms to any and all anesthesiologists who wish to practice there. As the Supreme Court noted recently in *Jefferson Parish Hospital District No. 2 v. Hyde*, — U.S. ——, ——, 104 S.Ct. 1551, 1568, 80 L.Ed.2d 2 (1984) ("*Hyde*"), a "hospital[ ] [has the] unquestioned right to exercise some control over the identity and number of doctors to whom it accords staff privileges."

[6] The question having antitrust significance here is not whether the competition has culminated in a contract that excludes the losers but rather whether the contractual exclusion itself is of such scope that its restraints may be considered unreasonable. If, for example, the agreement granted the provider of the services an interminable exclusive franchise, there could well be antitrust implications. The Contract challenged here, however, did no such thing. In addition to permitting the Hospital to purchase the services of Konik and any others added to its staff, the Contract provided that it was to be reviewed at six-month intervals. Thus, the Hospital was free at the end of six months to enter into a new arrangement either with AAP or with any other anesthesiologist. Indeed, it was the Konik Proposal, not the Contract, that would have perpetuated an arrangement at the behest of AAP or Konik: the Konik Proposal, unlike the Contract, pro-

vided that the arrangement could not be terminated or even revised without the consent of all of the parties thereto.

We find no greater merit in Konik's reliance on the testimony of Drs. Pang and Modak. In the spring of 1981, Pang was an employee of AAP. He apparently want-

6. The contract offered to Pang did not contain the provision for review by the parties every six months, and it provided that the fees of AAP

ed to become a member of the corporation and to practice anesthesiology with it. Under AAP's by-laws, no new member was to be accepted without the unanimous consent of the old members. Pang failed to receive unanimous approval and thus was not allowed to join AAP. This did not end the matter, however. AAP informed Pang that he could practice independently of AAP, and offered to enter, with Pang, a contract similar to the one offered to Konik.[6] Pang declined and went to practice anesthesiology in New Jersey. Far from showing that the defendants excluded Pang from the practice of anesthesiology at the Hospital, Pang's testimony thus showed that they offered him that very opportunity.

Modak was an anesthesiologist who applied to the Hospital for admittance to the staff in August 1978. He was advised by the Hospital administrators that his credentials were adequate and that he would be able to practice anesthesiology at the Hos-

pital "as an independent practitioner." (Tr. 1062.) Modak had a conversation with defendant Dr. Salem Bayoumy, Chief of the Hospital's Anesthesiology Department and a member of AAP, in which, according to Modak, Bayoumy told him, *inter alia*, "You cannot practice independently unless you join the group." (Tr. 1072.) Modak testified that he subsequently was informed by the Hospital that action on his application would be delayed, and that he immediately withdrew his application because he did not want "a hassle" with AAP. (Tr. 1056.) Regardless of Modak's mental processes, however, if his testimony as to what he was told were believed, it could not allow a jury to find that the defendants excluded him from the practice of anesthesiology at the Hospital. The Hospital administrators—who controlled access to the operating suites—told him he could practice anesthesiology independently; and to the extent that Bayoumy's statement that Modak could not practice *independently unless* he joined the group had any meaning, it could only have meant that AAP would offer to allow Modak to enter into an agreement like the Contract with AAP: otherwise the concepts of practicing independently and joining the group are mutually exclusive.

and Pang would be "generally consistent with" those charged by other anesthesiologists in similar upstate New York situations.

In sum, we see no basis in the record from which a rational jury could have con-

cluded that either Konik or other anesthesiologists were excluded from the practice of anesthesiology by means of the Contract between the Hospital and AAP.

Finally, Konik argues, in effect, that she was constructively excluded by means of the Contract because she chose not to enter it on account of its price-fixing provision prohibiting the participating anesthesiologists from charging fees that were higher than those charged in similar circumstances in like upstate New York communities. At trial, Konik eventually mentioned this provision as one of the terms of the Contract to which she had objected.[7] However, the record overwhelmingly indicates that this could not have been her reason for declining to enter the Contract. To begin with, Konik's testimony at trial made it plain that she simply did not wish to enter into any contract with the Hospital for the provision of services. When asked why she did not choose to sign the Contract proffered, she repeatedly answered, "I don't need a contract" (Tr. 335); "I told my attorney I don't agree to a contract" (Tr. 605); "I objected to a contract" (Tr. 610);

7. In answer to questions of what objections to the Contract she had voiced to the Hospital or AAP, and when she had voiced them, Konik responded as follows:

> A In August, in July when the document was in the process of being drawn up. There also were some clauses put in like—you only worked so-and-so much, and that takes it—well, the document was for the P.C., and Ko-

> nik. That is the thing. There is nothing else supposed to come in or allowed to come in, nobody to Plattsburgh and practice anesthesia. This document says you have to have the same fees, what I objected to. It is my decision if I want to charge the patient and it is between me and the patient and me if he wants to pay for it or not to pay.

(Tr. 337–38.)

"The reason I didn't sign the document is because I did not need a contract" (Tr. 616).

The fact that Konik proffered her own version of an agreement does not detract from her repeated testimony that she simply did not want to sign any contract. She testified that she had made the Konik Proposal because it contained a provision allowing her to test whether or not she could be compelled to sign a contract in order to provide anesthesiology services at the Hospital. Thus, she interpreted the reservation-of-right clause as follows:

> That says that if you are right and the corporation is right to tell me what I can do and that I have to sign a contract, then the Court will decide I have to sign a contract, and then this will all be settled, very simple. It was just a way to find out if I am compelled to sign a contract or not. Nobody else on the hospital staff has a contract except [AAP] in '78.

(Tr. 621–22.)

Most significantly, Konik's claim that she refused to sign the Contract because it contained an unlawful provision placing a ceiling on the prices the anesthesiologists

were permitted to charge patients of the Hospital is squarely contradicted by her own contemporaneous actions and omissions. She did not tender the defendants an agreement that did not contain a price ceiling provision. And the Konik Proposal that she did proffer contained a price provision almost identical to the one in the Contract.[8]

8. The Contract provision reads as follows:

> Fees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York.

The Konik Proposal read as follows:

> The parties hereto agree that the fees charged by the parties of the second part and third part will be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York.

At oral argument of this appeal, Konik's counsel suggested that the reservation-of-right clause in the Konik Proposal had been inserted in order to allow Konik to challenge the price provision. The silent premise of this suggestion —i.e., that Konik had been unable to get the

In sum, assuming the jury were to find Konik's own testimony credible, and given the undisputable terms of the Contract she attacks and of the counter-offer she made, we must agree with the trial judge that "reasonable men could not arrive at" the conclusion that the defendants, through the Contract or otherwise, excluded Konik from the provision of anesthesiology services at the Hospital.

With this necessary factual predicate in mind, we turn to the evaluation of Konik's antitrust claims.

B. *The Tying Claim*

[7] The gist of Konik's claim of an unlawful tie-in is that the Hospital has power over operating room facilities in Clinton County and has tied those facilities to the anesthesiology services provided by AAP.[9] Konik contends that patients wishing to undergo operations in the Hospital are therefore forced to purchase their anesthesiology services from AAP, and that such an arrangement is per se unlawful under § 1 of the Sherman Act. This claim was properly dismissed because the evidence failed to establish Konik's factual premise.

A tying arrangement may be per se unlawful under § 1 if (1) there are two separate products or services, (2) there is a sale or agreement to sell one such product or service (the "tying product") conditioned on the purchase of the other (the "tied product"), (3) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (4) the arrangement affects a not insubstantial amount of interstate commerce in the market for the tied product. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495,

provision deleted—is not credible since, although Konik made a number of other counterproposals, there is no evidence that she proffered any agreement excluding the price provision. Certainly no reason has been advanced as to why she might have shied away from suggesting its deletion if she were troubled by it. In any event, counsel's interpretation of the reser-

vation clause is contradicted by the record. The language of the reservation speaks only of Konik's "heretofore existing" claims, rather than of 497–98, 501–04, 89 S.Ct. 1252, 1255–1256, 1257–1259, 22 L.Ed.2d 495 (1969); *see also Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 & n. 15 (2d Cir.1980). In light of the Supreme Court's recent ruling in *Hyde*, there seems little question that the Hospital's operating room facilities and the provision of anesthesiology service must be viewed as separate services. *See* — U.S. at ——-——, 104 S.Ct. at 1562–1563. Further, it is clear that at least a jury question was presented as to whether the Hospital had sufficient economic power in the market for hospital operating facilities to enable it to restrain trade in the market for anesthesiology services. What was missing, however, was proof that the Hospital conditioned the sale of its operating room facilities on the purchase of anesthesiology services from AAP.

[8] The record establishes rather conclusively that the Hospital did not so condition the sale of its operating room facilities. It does require—as it is undoubtedly permitted to do, *see Hyde, supra*, at ——, 104 S.Ct. at 1568—that patients using its operating room facilities purchase the anesthesiology services from an anesthesiologist who is permitted access to those operating rooms; but, while the Hospital has the "unquestioned right" to limit the number of anesthesiologists it will allow to provide such services, *id.*, it has not limited that

number to just the physicians who are members of AAP. As discussed in part II.A. above, the Contract, or one like it, was offered to Konik and at least one other anesthesiologist as well, on the same terms that were applicable to AAP; and it provided that other anesthesiologists granted staff privileges at the Hospital would be allowed to render services along with AAP.

any claim arising out of obligations imposed by the agreement itself. And Konik testified that she viewed the reservation as "very simpl[y]" allowing her to test in court whether she was required to enter into any contract.

9. Konik asserts that she proved that Clinton County was the relevant geographical market and that interstate commerce was affected. Defendants have not taken issue with this contention.

The import of the Contract is thus that a number of anesthesiologists, including Dr. Konik, may gain access to the Hospital's operating rooms; the Hospital will permit a patient to purchase anesthesiology services from any such person. The fact that Konik has chosen not to enter into an agreement with the Hospital that would have gained her access to the operating suites, and that no other anesthesiologist has yet been admitted to the Hospital staff undoubtedly produces the practical effect that patients have only the AAP anesthesiologists from whom to choose. But that is legally insufficient in the circumstances of this case to establish that the Hospital has tied its operating facilities to the services of AAP.

The circumstances in the *Hyde* case that led the Supreme Court to the conclusion that a tying arrangement existed there were different, since there was little question that the contract at issue in *Hyde* was exclusive. The hospital in *Hyde* "regard[ed] itself as committed to a closed anesthesiology department. Only Roux [& Associates] was permitted to practice anesthesiology at the hospital." *Hyde, supra*, at ——, 104 S.Ct. at 1555. Thus, the Court stressed that "[n]o anesthesiologists except those employed by Roux may practice at [the hospital]," *id.*; that "the hospital[ ] require[d] that its patients obtain necessary anesthesiological services from Roux," *id.* at ——, 104 S.Ct. at 1565, that "the actual effect of the exclusive contract" must be examined, *id.* at ——, 104 S.Ct. at 1567, and it referred generally to "exclusive contracts such as the Roux contract," *id.*

It is plain that the failure of the record in the present case to support an inference that the Contract signed by the Hospital and AAP excluded Konik and other anesthesiologists significantly distinguishes the present case from *Hyde*. The evidence here was insufficient to establish an unlawful tie-in.

C. *The Claims of Boycott and Section 2 Violations*

[9] For the same reason, Konik's claim that the defendants engaged in an unlawful boycott in violation of § 1, and that

AAP attempted and conspired to monopolize the market for anesthesiology services in Clinton County, must fail. Each of those claims is predicated upon a construction of the Contract as an exclusive dealing device that prevented Konik from rendering anesthesiology services at the Hospital. Thus, to establish the boycott claimed in this case, Konik sought to show that her competitors, the members of AAP, caused the Hospital to refuse to deal with Konik. Likewise, the monopoly-related claims turn on the supposed effort of AAP to see to it that Konik was denied the privilege of providing anesthesiology services at the Hospital. For the reasons discussed above, the evidence was insufficient to support a rational inference that the Contract, offered to Konik at parity with AAP, was designed to exclude her.

To the extent that Konik seeks to argue in addition that AAP had been shown to possess a monopoly of the provision of anesthesiology services in Plattsburgh from 1971 to 1978, because all anesthesiologists in Plattsburgh during that period were members and/or employees of AAP, the record again fails to support a claim that AAP violated § 2 of the Sherman Act. In order for monopolization to violate § 2, the defendant must not only possess monopoly power in the relevant market, but that power must have been acquired or maintained willfully, rather than having been acquired or maintained "from growth or development as a consequence of a supe-

rior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1703–1704, 16 L.Ed.2d 778 (1966). The trial testimony, including that of Konik, was consistent that during this period, there were no other anesthesiologists who wanted to settle in Plattsburgh.[10]

D. *The Claim of Vertical Price-fixing*

Finally, we come to Konik's claim that the Hospital and AAP entered into an agreement vertically to set a maximum on the fees that would be charged by AAP for its anesthesiology services. The Contract provided as follows:

> Fees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York.

The district court found that "the quoted language by itself is not evidence of price fixing," and that Konik had "proffered not a scintilla of evidence in support of her vertical price fixing theory," 561 F.Supp. at 723, and it dismissed this claim on the ground that "any finding that defendants

10. Konik, for example, testified as follows:

> Q Was anybody else providing [anesthesia service] during that entire period other than the group of anesthesiologists who were part of your partnership or corporation, one or the other?

ha[d] combined to fix prices would be speculation at best," *id.* Although we believe the district court did not apply the proper legal standard in reaching its conclusion, we nonetheless conclude that the dismissal was proper on other grounds.

[10, 11] We assume that what the district court meant by its statements quoted above was that there was no evidence that the provision placing a ceiling on the prices to be charged by AAP had ever been adhered to or enforced. There was, for example, no evidence in the record as to what fees normally were charged in other upstate New York communities, or as to what fees AAP itself charged. Such a focus, however, misperceives the thrust of § 1 of the Sherman Act. That section makes unlawful "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." The focus of § 1 is the agreement or the combination. Such an agreement in restraint of trade need not be carried out in order for § 1 to be violated. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224–25 n. 29, 60 S.Ct. 811, 844–846 n. 29, 84 L.Ed. 1129 (1940) ("it is ... well-settled that conspiracies under the Sherman Act are not dependent on any overt act other

> A There were no applications, nobody did come to town and wanted to stay.

than the act of conspiring. It is the 'contract, combination ... or conspiracy in restraint of trade or commerce' which § 1 of

the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.") (citations omitted). We think it clear that the term of the Contract that set maximum fees to be charged constituted evidence of a contractual vertical price restraint. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, — U.S. —, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). *See also Arizona v. Maricopa County Medical Society, supra* (horizontal agreement among hundreds of competing doctors to set maximum prices held per se unlawful).

This conclusion does not mean, however, that Konik's vertical price-fixing claim should not have been dismissed. A plaintiff who sues for treble damages under § 4 of the Clayton Act not only must prove that the defendants violated that Act, but also must prove that her claimed injury was caused by the violation. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562–3, 101 S.Ct. 1923, 1927–1928, 68 L.Ed.2d 442 (1981); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *GAF Corporation v. Circle Floor Co.*, 463 F.2d 752, 758–59 (2d Cir.1972), *cert. dismissed*, 413 U.S. 901, 93 S.Ct. 3058, 37 L.Ed.2d 1045 (1973). Our review of the record persuades us that this claim was properly dismissed because Konik had failed to present any evidence from which it could rationally be inferred that

she was injured by reason of the inclusion of the price ceiling in the Contract.

As set forth in detail in Part II.A. above, the trial evidence overwhelmingly showed that the presence of the price ceiling was not the reason for Konik's declining to enter into the Contract with AAP and the Hospital. She included the same price provision in her own counterproposal. And she did not proffer an agreement that excluded the price term. Given the nature

(Tr. 576.)

and clarity of the documentary evidence as to the terms to which Konik was expressly willing to agree if she had to sign any agreement, we conclude that no rational jury could have concluded that Konik refused to sign the Contract on account of its inclusion of the price ceiling term. Accordingly, Konik failed to prove that the asserted vertical price-fixing caused her injury, and her claim was properly dismissed.[11]

CONCLUSION

The judgment of the district court is affirmed.

APPENDIX B.

Order of the United States Court of Appeals for the Southern Circuit Denying Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31th day of May one thousand nine hundred and eighty-four.

LOUISE KONIK, M.D.,

Plaintiff-Appellant,

v.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, ANESTHESIA ASSOCIATES OF PLATTSBURGH, P.C., DAVID T. HANNAN, As President of Champlain Valley Physicians Hospital, and individually; MICHAEL J. MOYNIHAN, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, and individually; SALEM BAYOUMY, M.D. as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and individually; and JOHN MENUSTIK, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., and individually,

Defendants-Appellees.

No. 83-7191

A petition for rehearing containing a suggestion that the action be reheard *in banc* having filed herein by counsel for the plaintiff-appellant, Louise Konik, M.D.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is Denied.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX C.

Opinion of the United States District Court for the Northern District of New York.

561 FEDERAL SUPPLEMENT

Louise KONIK, M.D., Plaintiff,

v.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, Anesthesia Associates of Plattsburgh, P.C., David T. Hannan, as President of Champlain Valley Physicians Hospital, and individually; Michael J. Moynihan, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, and individually; Salem Bayoumy, M.D., as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and individually; and John Menustik, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., and individually, Defendants.

No. 79-CV-217.

United States District Court,
N.D. New York.

Feb. 28, 1983.

Opinion on Motions for Directed Verdict
March 2, 1983.

Anesthesiologist brought action for declaratory, injunctive and monetary relief against hospital, professional corporation

for practice of anesthesiology, and officials of such entities, seeking recovery under Sherman and Clayton Antitrust Acts, Civil Rights Act, and Medicare Act. After grant of defendants' motion to dismiss as to the civil rights, medicare and state pendent claims, denial of defendants' motion to dismiss as to the antitrust claims, and denial of plaintiff's cross motion for preliminary injunctive relief, defendants moved to dismiss antitrust claims for lack of subject-matter jurisdiction and for failure to state a claim or, in the alternative, for summary judgment, and moved for directed verdict, and plaintiff cross moved for partial summary judgment. The District Court, Miner, J., held that: (1) plaintiff's allegations satisfied "effect on commerce" test of jurisdiction under Sherman Act; (2) genuine issues of material fact precluded summary judgment as to plaintiff's Sherman Act claims; (3) genuine issues of material fact precluded summary judgment in favor of hospital under *Colgate* doctrine; and (4) evidence failed to establish antitrust claims.

Ordered accordingly.

1. Commerce ⇐62.10

Jurisdictional requirement under Sherman Act may be satisfied by showing that challenged activity either occurred in interstate commerce or, though wholly local in nature, has effect on interstate commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Commerce ⇐62.11

Jurisdictional issue in antitrust cases involving denial of hospital staff privileges or access to hospital facilities may be determined under "effect on commerce" test. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Commerce ⇐62.10

To establish jurisdiction for Sherman Act purposes under "effect on commerce" test, plaintiff need not show that defendants' challenged conduct itself had substantial effect on interstate commerce; rather, plaintiff must establish that there exists sufficient nexus between challenged activity and interstate commerce so that it can be said as matter of practical economics that there is a not insubstantial effect on interstate commerce involved. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⇐28(3)

In determining jurisdiction for Sherman Act purposes, there is no talismanic test. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Commerce ⇐62.14

Allegations in anesthesiologist's complaint that she, hospital, and professional corporation for practice of anesthesiology treated patients who traveled in interstate commerce, administered and prescribed drugs and anesthesia supplies manufactured out of state, and were paid by out-of-state, third-party insurers and payers, that hospi-

tal had direct link with interstate commerce by virtue of training programs for medical students at out-of-state university, and that hospital's and professional corporation's alleged exclusive contractual arrangements were allegedly designed to prevent anesthesiologist and others from competing in delivery of anesthesia services at hospital satisfied "effect on commerce" test of jurisdiction under Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies ⇐12(1.10)

Under "rule of reason," only unreasonable restraints of trade are forbidden, and restraint of trade is deemed "unreasonable" when anticompetitive effects outweigh procompetitive effects of challenged activity. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

See publication Words and Phrases for other judicial constructions and definitions.

7. Monopolies ⇐12(11)

Per se violations of Sherman Act, including group boycotts and tying arrangements, apply equally to health care profession as to other industries. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐17(2.5)

Not all tying arrangements are proscribed by Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies ⇐17(2.5)

Tying arrangement is per se violation of Sherman Act when it exhibits: two separate products, i.e., tying product and tied product; sufficient market power in tying market to coerce purchase of tied product; involvement of not insubstantial amount of interstate commerce in tied market; and anticompetitive effects in tied market. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Federal Civil Procedure ⇐2484

In anesthesiologist's Sherman Act action against hospital, professional corporation for practice of anesthesiology, and officials of such entities, genuine issue of material fact existed as to existence of exclusive contract, precluding summary judgment regarding existence of tying arrangement between use of hospital's operating rooms and purchase of hospital's chosen anesthesia service. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. Monopolies ⇐17(2.5)

To prove existence of tying arrangement between hospital and professional corporation for practice of anesthesiology pursuant to which users of hospital's operating rooms were compelled to purchase hospital's chosen anesthesia service, anesthesiologist did not have to prove that hospital totally dominated market; all that she had to show was that hospital possessed sufficient economic power to impose appreciable restraint on free competition in tied product, i.e.,

anesthesia services. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Monopolies ⇐17(2.5)

In demonstrating sufficient market power on part of hospital to impose appreciable restraint on free competition in tied product, i.e., anesthesia services which users of hospital's operating rooms were allegedly compelled to purchase under allegedly exclusive contractual arrangement between hospital and professional corporation for practice of anesthesiology, anesthesiologist had to demonstrate relevant geographic market for hospital's services and then show that, within such geographic market, hospital had power to raise prices or to require purchasers to accept burdensome terms that could not be exacted in completely competitive market; question was whether hospital had some advantage not shared by competitors in market for tying product. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

13. Monopolies ⇐17(2.5)

Even if anesthesiologist, who alleged tying arrangement between hospital and professional corporation for practice of anesthesiology pursuant to which users of hospital's operating rooms were compelled to purchase hospital's chosen anesthesia service, failed to prove allegations that hospital was only major facility in tricounty service area, that it was only hospital facility in county, and that patients flocked to hospital due to size, location, reputation, scope

of services offered, and also due to fact that it was area's only referral hospital, relevant market area could still be demonstrated by showing that patients tended to choose hospitals by location, rather than by price or quality. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

14. Monopolies ⇐17(2.5)

For purpose of demonstrating "sufficient market power," i.e., that within relevant market area hospital was able to coerce its purchasers of services into accepting burdensome terms that could not be exacted in completely competitive market, anesthesiologist, who alleged existence of tying arrangement between hospital and professional corporation for practice of anesthesiology pursuant to which users of hospital's operating rooms were compelled to purchase hospital's chosen anesthesia service, had to show that patients were compelled to purchase hospital's chosen service in return for use of hospital's operating room and analogous services or, in other words, had to proffer evidence that patients requested complaining anesthesiologist or others and were refused. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

15. Monopolies ⇐17(2.5)

For purpose of demonstrating "sufficient market power" with respect to alleged tying arrangement between hospital and professional corporation for practice of anesthesiology pursuant to which users of hospital's operating rooms were compelled to

purchase hospital's chosen anesthesia service, i.e., that within relevant market area hospital was able to coerce its purchasers of services into accepting exclusive contract that could not be exacted in completely competitive market, there must have existed competition between anesthesiologists insofar as patients were concerned. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

16. Monopolies ⇐28(1.7)

Only hospital could be liable for Sherman Act violation under tying arrangement theory of liability, i.e., that tying arrangement existed between hospital and professional corporation for practice of anesthesiology pursuant to which users of hospital's operating rooms were compelled to purchase hospital's chosen anesthesia service, where professional corporation lacked sufficient market power in tying product, i.e., hospital's operating rooms, to have anticompetitive effects on market and complainant had not pleaded conspiracy to engage in tying agreement between hospital and group practice. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

17. Monopolies ⇐17(1.7)

Maximum as well as minimum price fixing is per se evil proscribed by Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

18. Monopolies ⇐17(1.8)

Anesthesiologist, who contended that section of contract between hospital and

professional corporation for practice of anesthesiology requiring that fees charged be no greater than those charged by other anesthesiologists for similar work situations in specified geographic area established unlawful maximum price fixing between hospital and professional corporation, could prevail on per se price-fixing theory if it could be shown that agreement or combination was formed for purpose and with effect of raising, depressing, fixing, pegging or stabilizing price of anesthesiology services in interstate or foreign commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

19. Monopolies ⇐28(8)

With respect to anesthesiologist's allegation that section of allegedly exclusive contract between hospital and professional corporation for practice of anesthesiology requiring that fees charged be no greater than those charged by other anesthesiologists for similar work situations in specified geographic area established unlawful maximum price fixing between hospital and professional corporation, whether agreement or combination was formed for purpose and with effect of raising, depressing, fixing, pegging or stabilizing price of commodity in interstate or foreign commerce was question of fact for trial. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

20. Monopolies ⇐12(11)

Anesthesiologist's allegation that section of allegedly exclusive contract between

hospital and professional corporation for practice of anesthesiology requiring that fees charged be no greater than those charged by other anesthesiologists for similar work situations in specified geographic area established unlawful maximum price fixing between hospital and professional corporation was properly treated, once exclusivity of contract had been demonstrated, as matter involving vertical combination. Sherman Anti-Trust Act, § 1, 15 U.S. C.A. § 1.

21. Monopolies ⇐12(1.14)

For Sherman Act purposes, vertical combination should be analyzed under rule of reason. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

22. Monopolies ⇐12(1.10)

Rule of reason requires trier of fact to decide whether under all circumstances restrictive practice imposes unreasonable restraint on competition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

23. Monopolies ⇐17(1.7)

In context of demonstrated exclusive dealing arrangement, anesthesiologist, who alleged that section of allegedly exclusive contract between hospital and professional corporation for practice of anesthesiology requiring that fees charged be no greater than those charged by other anesthesiologists for similar work situations in specified geographic area established unlawful maximum price fixing between hospital and pro-

fessional corporation, could prevail in proving vertical combination in violation of rule of reason under Sherman Act only upon showing that agreement resulted in substantial foreclosure of competition in area of competition, i.e., in relevant market. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

24. Federal Civil Procedure ⇐2484

In Sherman Act action brought by anesthesiologist against hospital, professional corporation for practice of anesthesiology, and officials of such entities, genuine issues of material fact existed as to whether hospital stood in position of buyer of anesthesia services, whether exclusive contract existed between hospital and professional corporation, and whether agreement resulted in substantial foreclosure of competition in relevant market, precluding summary judgment as to existence of vertical combination. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

25. Monopolies ⇐12(11)

Small professional corporation for practice of anesthesiology was functional equivalent of partnership arrangement for antitrust purposes. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

26. Monopolies ⇐17(1.7)

Anesthesiologist could not recover under Sherman Act against professional corporation for practice of anesthesiology on theory that professional corporation had set

fee schedule and that therefore, since there was no price competition among individual members of professional corporation, fee schedule adopted constituted illegal price-fixing arrangement. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

27. Monopolies ⇐17(2.2)

Purpose and effect of questioned arrangement is cornerstone of per se illegality of alleged collective refusal to deal under Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

28. Monopolies ⇐17(2.2)

Resort to per se rule of illegality of collective refusals to deal under Sherman Act is justified only when there exists presence of exclusionary or coercive conduct which, when present, warrants view that arrangement is naked restraint of trade and, absent such factors, rule of reason must be followed in determining legality of agreement. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

29. Monopolies ⇐12(11)

If proof of allegations existed that purpose of allegedly exclusive agreement between hospital and professional corporation for practice of anesthesiology was to either drive nonparticipant anesthesiologist out of business or to coerce her into entering or ratifying illegal price-fixing agreement, hospital and professional corporation would be liable for violation of Sherman Act un-

der per se group-boycott analysis. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

30. **Federal Civil Procedure** ⇐2484

In Sherman Act action brought by anesthesiologist against hospital, professional corporation for practice of anesthesiology, and officials of such entities, genuine issues of material fact existed as to whether anesthesiologist was denied access to hospital facilities because of refusal to partake in allegedly illegal and exclusive price-fixing agreement, precluding summary judgment as to group-boycott claim. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

31. **Monopolies** ⇐12(1.1)

To be "essential" for purpose of essential-facility doctrine, facility need not be indispensable; it is sufficient if duplication of facility would be economically unfeasible and if denial of its use inflicts severe handicap on potential market entrants. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

32. **Federal Civil Procedure** ⇐2484

In Sherman Act action brought by anesthesiologist against hospital, professional corporation for practice of anesthesiology, and officials for such entities, genuine issues of material fact existed, even assuming that hospital was "essential facility," as to whether anesthesiologist had been unfairly denied use of hospital facilities, whether contract between hospital and professional corporation was exclusive dealing agreement, and whether anesthesiologist was jus-

tified in not partaking in such agreement, precluding summary judgment as to claim of violation of essential-facility doctrine in denying anesthesiologist access to hospital facilities. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

33. Monopolies ⇐12(1.14)

Under *Colgate* doctrine, unilateral policy decisions, motivated by market strategy or business necessity, which impose reasonable vertical restraint cannot give rise to antitrust liability. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

34. Federal Civil Procedure ⇐2484

In Sherman Act action brought by anesthesiologist against hospital, professional corporation for practice of anesthesiology, and officials of such entities, genuine issues of material fact existed as to whether allegedly exclusive agreement between hospital and professional corporation for delivery of anesthesiology services was necessary to provide such services and as to anesthesiologist's group boycott theory, precluding summary judgment in favor of hospital under *Colgate* doctrine. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

35. Monopolies ⇐12(11)

Although anesthesiologist's antitrust claims against hospital and professional corporation for practice of anesthesiology were predicated upon existence of exclusive agreement for provision of anesthesia services, fact that anesthesiologist refused to

join in agreement did not preclude recovery against hospital and professional corporation where offer to join anesthesiologist to agreement was only some evidence of nonexclusivity and anesthesiologist alleged that contract itself was unlawful so that to force her to agree to, and abide by, allegedly unlawful contract in order to be able to attack agreement would present her with situation of litigating lack of competition while being party to restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

On Motion for Directed Verdict

36. Monopolies ⇐28(7.4)

Evidence failed to establish existence of exclusive arrangement for provision of anesthesia services between hospital and professional corporation for practice of anesthesiology, notwithstanding witness' testimony that physician who was chief of anesthesiology and member of professional corporation told him that membership in professional corporation was prerequisite to provision of anesthesiology services at hospital. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

37. Monopolies ⇐12(11)

Hospital had right to contract with any party it chose in order to provide its services and thus very existence of contract between hospital and professional corporation for practice of anesthesiology did not constitute illegal arrangement under anti-

trust laws. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

38. Monopolies ⇐12(11)

In order to prove illegality of contract between hospital and professional corporation for provision of anesthesia services under antitrust laws, nonparticipant anesthesiologist had to demonstrate that contract was unlawful or that purpose of contract, besides being superfluous to purposes achieved by bylaws of hospital and rules and regulations of anesthesiology department, was unlawful. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

39. Monopolies ⇐17(1.7)

Although section of agreement between hospital and professional corporation for provision of anesthesia services provided that fees charged would be no greater than those charged by other anesthesiologists for similar work in specified geographic area, such language, by itself, was not evidence of price fixing. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

40. Monopolies ⇐28(7.5)

Evidence failed to establish that denial of access to hospital facilities to anesthesiologist constituted illegal boycott where there was no evidence that contract between hospital and professional corporation for provision of anesthesia services was exclusive and therefore prohibited nonparticipating anesthesiologist from competing with professional corporation and evidence indicated

that hospital, professional corporation, and officials of such entities made substantial efforts to accommodate anesthesiologist in proposed arrangements. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

41. Monopolies ⇐28(7.6)

Assuming that hospital was essential facility, for purpose of essential-facility doctrine, anesthesiologist, who withdrew as member of professional corporation for practice of anesthesiology after corporation and hospital allegedly entered into exclusive contract for provision of anesthesia services, had failed to demonstrate any severe economic handicap resulting from her alleged exclusion from hospital facilities so as to be entitled to recovery in view, inter alia, of testimony indicating that anesthesiologist worked and could continue to work in other facilities. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

42. Monopolies ⇐28(7.5)

Where it had not been shown that hospital, professional corporation for practice of anesthesiology, and officials of such entities eliminated significant competition or attempted or conspired to eliminate competition in entering into contract for provision of anesthesia services at hospital, monopolization claims of anesthesiologist, who withdrew from membership in professional corporation after corporation entered into contract with hospital, failed. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

Tobin & Dempf by Michael L. Costello, David Ruff, Albany, N.Y., for plaintiff.

Fitzpatrick, Bennett, Trombley, Lennon & Owens by James A. Fitzpatrick, Edward Trombley, Plattsburgh, N.Y., for defendants Champlain Valley Physicians Hosp. Medical Center, David T. Hannan, Michael J. Moynihan, M.D., and Salem Bayoumy, M.D.

Carter, Conboy, Bardwell, Case & Blackmore by James S. Carter, Susanna Fisch, Albany, N.Y., for defendants Anesthesia Associates of Plattsburgh, P.C., and John Menustik, M.D.

MEMORANDUM–DECISION and ORDER

MINER, District Judge.

I

Plaintiff, an anesthesiologist, has commenced this action for declaratory, injunctive and monetary relief against the following defendants: Champlain Valley Physicians Hospital Medical Center (hereinafter the "hospital"), its President, David T. Hannan, its Chief of Staff, Michael J. Moynihan, Anesthesia Associates of Plattsburgh, P.C. (hereinafter "AAP"), its President, John Menustik and the hospital's Chief of Anesthesiology, Salem Bayoumy. Plaintiff's complaint contained claims for relief under the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1 *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the Medicare Act, 42 U.S.C. §§ 1395 *et seq.* Subject

matter jurisdiction for the various federal claims was predicated upon 28 U.S.C. §§ 1331(a), 1343(3) and 1337. Additionally, the complaint set forth four claims for relief invoking this Court's pendent jurisdiction, and, finally, treble damages, compensatory damages and punitive damages were sought.

On July 19, 1979, the Honorable James T. Foley, U.S.D.J., granted defendants' motion to dismiss as to the civil rights, medicare and state pendent claims and denied defendants' motion to dismiss as to the antitrust claims. Plaintiff's cross-motion for preliminary injunctive relief was denied and dismissed. *See Konik v. Champlain Valley Physicians Hospital Medical Center*, 79–CV–217 (N.D.N.Y. July 19, 1979). The only claims remaining, then, are plaintiff's antitrust claims.[1]

Before this Court is defendants' motion to dismiss the antitrust claims for lack of subject matter jurisdiction and for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), and, in the alternative, for summary judgment pursuant to Fed.R. Civ.P. 56(b). Also before this Court is plaintiff's cross-motion for partial summary judgment pursuant to Fed.R.Civ.P. 56(a).

1. The Court refused to grant defendants' motion as to the plaintiff's first "cause of action," the antitrust claims, in part because there was an insufficiency of discovery to form a basis for summary judgment on the contested jurisdictional issue.

II

Plaintiff is a physician duly licensed to practice medicine in the State of New York. She has held her license since 1958 and her specialty is anesthesiology. On January 1, 1961, Dr. Konik was appointed to the staff of the predecessor of the defendant, Champlain Valley Physicians Hospital Medical Center, and has remained on the general medical staff of the defendant hospital over the last twenty-two years. (Affidavit of Louise Konik, M.D., sworn to October 27, 1982, ¶ 8; hereinafter "Konik Affidavit").[2] Indeed, Dr. Konik has served as Chief of the Anesthesiology Department at the hospital.

In June, 1969, the anesthesiologists serving the defendant hospital subscribed to a document that stated their intent to form a professional group for the practice of anesthesiology in Plattsburgh. Plaintiff herself signed this document. (Affidavit of David T. Hannan, sworn to April 9, 1979, Ex. A; hereinafter "Hannan Affidavit"). Moreover, due to the expansion of the hospital and the increase in the need for their professional services, the hospital encouraged the five staff anesthesiologists to "enter a group practice arrangement." (Hannan Af-

2. Dr. Konik's latest appointment occurred on January 18, 1982, when the hospital's board of directors approved her appointment to the "Attending Medical Staff" and granted her "Senior Privileges in Anesthesiology." (Konik Affidavit, ¶ 9, Ex. 3).

fidavit, Ex. C). A formal partnership agreement, reciting the wishes of the hospital, was executed by the anesthesiologists on January 1, 1971. (Hannan Affidavit, Ex. B). During this early existence of the anesthesiology group, however, the hospital did not believe that a formal contract between itself and the group was required since the scheduling of services through the group "would preempt the available caseload." (Hannan Affidavit, Ex. D).

There is no mention of fee arrangements in the anesthesiologists' partnership agreement. However, there is some evidence that a billing fee of $35.00 was collected by the hospital for anesthesia services during obstetrical vaginal delivery, that quarterly transfers of the accumulated fees were made to the group, and that such an arrangement was the product of an agreement between the hospital and the anesthesiologists as a group. (Hannan Affidavit, Ex. F).

During the year 1973, the anesthesiology group established a professional corporation, allegedly for administrative and professional reasons. This is the professional corporation which in this action constitutes the defendant AAP (Konik Affidavit, ¶ 25). Dr. Konik continued to be affiliated with AAP until August, 1978. (*Id.*, ¶ 27).

It is not entirely clear from the record whether plaintiff chose to withdraw from the AAP as a consequence of the hospital's decision to require a formal contractual un-

dertaking between itself and the anesthesiologists as a condition to the delivery of those services, or, whether plaintiff withdrew from the group for internal and personal reasons other than the contractual clauses plaintiff now finds to be objectionable.[3] In any event, the hospital's stated reason for the contractual arrangement was to "provide community anesthesiology services sufficient in quantity and quality to meet the ongoing surgical and obstetrical demands of its patients." (Hannan Affidavit).

Plaintiff alleges that at this time she was advised that she would not be permitted any access to the surgical suites at the hospital unless she agreed "to abide by and become a signatory to the contemplated exclusive contract between the hospital and defendant, AAP." (Konik Affidavit, ¶ 30). However, on August 1, 1978, an offer was made to Dr. Konik on behalf of the hospital and its administration, to allow her to practice at the hospital and deliver anesthesia services for a period of time up to Septem-

3. Dr. Konik seems to maintain that she discontinued her "affiliation with the defendant, AAP, in order to practice as an independent physician with Senior Privileges in Anesthesiology at defendant, [hospital]." (Konik Affidavit, ¶ 28). Dr. Konik, however, also hints that she resigned from AAP since "discussions and negotiations had been undertaken [at the time of her departure] between the defendant, [hospital], and defendant, AAP, for purposes of entering into an exclusive contract [between the hospital and AAP] ... whereby [AAP] would have the exclusive franchise for providing anesthesia services at the [hospital]." (Konik Affidavit, ¶ 29).

ber 1, 1978, as an independent physician on the staff practicing as "a solo physician." (Konik Affidavit, ¶ 31, Exs. 5, 6).

During this period of time, plaintiff maintains, there was no disruption in anesthesia coverage at the hospital, the assignment of anesthesia services was effectively handled by the Department of Anesthesiology, she effectively competed with AAP in delivering anesthesia services to the hospital, and that this arrangement "proceeded smoothly . . . with no problems whatsoever," in part because she was obligated to abide by the bylaws of the General Medical staff of the hospital as well as all of the rules, regulations and bylaws of the Department of Anesthesiology, all of which allegedly provide that physicians must furnish necessary services when required.[4] (*Id.*, ¶ 33). Plaintiff further maintains that on September 1, 1978 defendant President Hannan ordered defendant Bayoumy, then Chief of Anesthesiology, to remove Dr. Konik from the anesthesia rotation schedule. As a consequence, plaintiff has not engaged in the active practice of her profession at the defendant hospital since September, 1978.

Between September and November, 1978, the hospital and plaintiff attempted to

4. Plaintiff also contends that no proceedings in accordance with the hospital bylaws have ever been instituted regarding her conduct, either professionally, or as a consequence of her withdrawal from AAP. This contention is uncontroverted.

reach an accommodation regarding the content of the agreements which the hospital allegedly required as a condition of the delivery of anesthesiology services to its patients. One of the proposed agreements is alleged to have provided for a uniform posted fee schedule, to which the plaintiff objected. Dr. Konik signed and submitted a counter proposal, dated September 29, 1978, with a provision, originally contained in the earlier August 31, 1978 tripartite agreement subscribed to by the hospital and AAP but unsigned by plaintiff, that provided that the fees charged will be no greater than those charged by other anesthesiologists for similar work situations in upstate New York. (Hannan Affidavit, Ex. G). This counter proposal also sought to reserve to the plaintiff all legal rights against the defendants. The defendant hospital and the defendant AAP did not sign this proposal.[5]

Plaintiff states that she was "forced" to sign and submit this counter proposal "to restore my access to the surgical suites of

5. Paragraph 6 of the September 29th agreement provides, "[t]he execution of this Memorandum of Understanding shall not be deemed a waiver of any cause of action of the party of the third-part [Dr. Konik] heretofore existing against any other party to this agreement." Plaintiff contends that the reason AAP and the hospital refused to sign this agreement was that she intended to challenge the legality of this and prior "exclusive" agreements. (Konik Affidavit, ¶ 36).

the defendant hospital in order that I could continue delivering anesthesia services," lest professional inactivity result in a deterioration of her skills. (Konik Affidavit, ¶ 35). Dr. Konik further states that she will not be coerced into entering into any contract, similar to the August 31, 1978 agreement, regulating her fee schedule and that, as a competent practitioner of 18 years, she will not have her status reviewed every six months as provided for in the contract. She asserts that the matter of a due process violation (denial of the use of hospital facilities for delivery of anesthesiological services), in addition to the contractual impasse, was brought to the attention of the State and County Medical Societies at a November 13, 1978 meeting between the principals and representatives of those societies. (Konik Reply Affidavit).

A new proposal was submitted by defendants, attempting to incorporate the clauses desired by plaintiff and reach an accommodation as to the disputed reservation of legal rights. (Hannan Affidavit, Ex. I). Plaintiff apparently refused to sign this compromise agreement. Therefore, plaintiff claims, the original tripartite agreement (hospital-AAP-plaintiff) of August 31, 1978, signed only by the defendants hospital and AAP, is presently in effect.[6]

6. It is not disputed that the August 31st agreement is still in effect, at least between defendants hospital and AAP. However, it is the effect and scope of the contract that is at the very heart of the dispute at bar. The agreement is provided in Appendix A, *infra*, for the reader's convenience.

III

Plaintiff's remaining claim, entitled "First Cause of Action," purports to set forth claims under 15 U.S.C. §§ 1, 2, 14, 15 and 26. Under the heading of "First Cause of Action," two individual "counts" are pleaded, alleging violations of 15 U.S.C. §§ 1 and 2. A liberal reading of plaintiff's antitrust averments reveals that the gravamen of her § 1 claims are premised upon the *per se* violations of price-fixing, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927), and group boycotts or concerted refusals to deal, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 and n. 5, 79 S.Ct. 705, 709 and n. 5, 3 L.Ed.2d 541 (1959) (Complaint, ¶¶ 40, 41). Plaintiff's partial summary judgment motion is specifically predicated upon a showing of an illegal tying arrangement (exclusive contract), horizontal price fixing, vertical price fixing, illegal group boycott, and a violation of the essential facilities doctrine. (Notice of Motion by Plaintiff for Partial Summary Judgment, dated October 27, 1982).

Defendants have asserted in their summary judgment motion [7] an array of defenses against plaintiff's antitrust claims, including: (1) the lack of a showing of the existence of an exclusive contract, *Capili v. Shott*, 620 F.2d 438 (4th Cir.1980); (2) the failure to demonstrate a conspiracy or a

7. Since the Court is considering material outside the pleadings, defendants' motion shall be treated solely as one for summary judgment.

combination in restraint of trade or commerce among the states; and (3) the lack of subject matter jurisdiction under the Sherman Act, *Yellow Cab Co. of Nevada v. Cab Emp. Automotive*, 457 F.2d 1032 (9th Cir. 1972); *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 536 F.Supp. 1065 (E.D.Pa.1982). As a threshold matter, this Court shall consider the jurisdictional question.

JURISDICTIONAL PREREQUISITES UNDER THE SHERMAN ACT

[1, 2] The jurisdictional requirement under the Sherman Act may be satisfied by showing that the challenged activity either occurred in interstate commerce, or, though wholly local in nature, has an effect on interstate commerce. *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). "It can no longer be doubted . . . that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." *Id.* at 242, 100 S.Ct. at 509. It is also well established that the jurisdictional issue in antitrust cases involving the denial of hospital staff privileges or access to hospital facilities may be determined under the "effect on commerce" test. *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir.1980). *See also Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225 (10th Cir.1982).

[3, 4] To establish jurisdiction under the "effect on commerce" test plaintiff need

not show that the defendants' challenged conduct *itself* had a substantial effect on interstate commerce. "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases."[8] *McLain v. Real Estate Board of New Orleans, supra,* 444 U.S. at 243, 100 S.Ct. at 509. The plaintiff, then, must establish that there exists a sufficient nexus between the challenged activity and interstate commerce so that it can be said "as a matter of practical economics" there is "a not insubstantial effect on the interstate commerce involved." *Id.* at 246, 100 S.Ct. at 511. In determining jurisdiction, there is no talismanic test. "Rather, jurisdiction must be determined using a case-by-case analysis of the relevant economic facts." *Heille v. City of St. Paul, Minnesota,* 671 F.2d 1134, 1136 (8th Cir.1982). Moreover, "the impact defendant's professional activities may have upon interstate commerce . . . is a question of fact . . . ." *Williams v.*

8. "Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to qualify the adverse impact of defendant's conduct. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123–25 [89 S.Ct. 1562, 1576–77, 23 L.Ed.2d 129] (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265–266 [66 S.Ct. 574, 580, 90 L.Ed. 652] (1946)." *McClain v. Real Estate Bd. of New Orleans, supra,* 444 U.S. at 243, 100 S.Ct. at 510.

St. Joseph Hospital, 629 F.2d 448, 454 (7th Cir.1980).

Here, it is conceded that the plaintiff, Dr. Konik, has been denied use of the facilities at the defendant hospital for delivery of anesthesia services because she failed to sign a contract for the rendering of such services. Dr. Konik alleges that this denial of access by the named defendants violated the antitrust laws under the Sherman Act.

[5] In maintaining that the jurisdictional requirement of the Sherman Act has been met, Dr. Konik presents allegations in her complaint, accompanied by certain proof in depositions and affidavits, that:

1. plaintiff treated patients who traveled in interstate commerce;

2. plaintiff administered and prescribed a substantial quantity of pharmaceutical drugs and anesthesia supplies which were manufactured out of state;

3. a substantial portion of the fees charged by plaintiff was paid by out of state, third-party insurers and payers, including the federal government;

4. defendants treat a substantial number of patients who travel in interstate commerce;

5. the defendants purchase, administer, prescribe, and use drugs and supplies manufactured out of state;

6. defendants receive a substantial amount of revenues from third-party, out

of state insurers and payers, including the federal government;

7. the defendant hospital has a direct link with interstate commerce by virtue of its contractual training programs for the medical students of the University of Vermont Medical School and the undergraduates at the University of Vermont; and

8. the defendants' activities are allegedly designed to prevent plaintiff and others from competing with defendants in the delivery of anesthesia services at defendant hospital.[9]

This Court agrees with plaintiff that these allegations do fall within the "effect on commerce" test. *See Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir.1982); *Crane v. Intermountain Health Care, supra; Everhart v. Jane C. Stormont Hospital*, 1982–1 Trade Cases ¶ 64, 703 (D.Kan.1982); *Malini v. Singleton & Associates*, 516 F.Supp. 440 (S.D.Tex. 1981); *Williams v. Kleaveland*, 534 F.Supp. 912 (W.D.Mich.1981); *Robinson v. Magovern*, 521 F.Supp. 842 (W.D.Pa.1381); *Santos v. Columbus-Cuneo-Cabrini Medical Center*, 1982–1 Trade Cases ¶ 64, 498 (N.D. Ill.1981), *remanded on other grounds*, 684 F.2d 1346 (7th Cir.1982); *Stone v. William*

9. *See* Complaint, ¶ 28; Defendants' Admissions.

Beaumont Hospital, 79–74212 (E.D.Mich. 1981).[10]

In the present case, defendants have moved for summary judgment in part, claiming that the plaintiff has failed, as a matter of law, to establish the jurisdictional elements of a Sherman Act claim. Defendants rely heavily on a recent case from the Eastern District of Pennsylvania, *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 536 F.Supp. 1065 (E.D.Pa. 1982). It is contended that *Cardio-Medical* is authority for the following two propositions: (1) in analyzing the nexus between defendants' challenged activities in interstate commerce, the courts must look only

10. The above cases all involve physicians being denied staff privileges or access to defendant hospital's facilities as a result of alleged exclusive contractual arrangements among the named defendants. The underlying rationale of these cases is that defendants' activities affect interstate commerce because they retard competition. This retardation affects interstate commerce in the following ways: first, by denying to physicians the opportunity to compete, prices will invariably stabilize at some fixed rate and this will affect the amount of payments made by out of state, third-party insurers. Allowing these plaintiff-physicians privileges and access will provide patients and third-party insurers the benefits of free and open competition. This in turn will affect the amount of payments made by out of state, third-party insurers. Second, the competition that will be generated by permitting physicians staff privileges and access will affect the volume of out of state patients treated and the volume of the out of state purchases of supplies. This point was specifically addressed in *Malini v. Singleton and Associates, supra*.

to the plaintiff's interstate commerce activities; and (2) the treatment of patients who travel in interstate commerce, the purchase of supplies from out of state sources and the receipt of revenues from out of state third-party insurers, do not satisfy the interstate commerce requirement of antitrust law. Neither proposition, this Court believes, is an accurate statement of the current state of the law in this area.

As to the first proposition, the court based its holding solely on *Nara v. American Dental Association*, 526 F.Supp. 452 (W.D.Mich.1981). In *Nara*, a dentist's membership in defendant's national organization was suspended as a result of plaintiff's violation of the Michigan Dental Code. Plaintiff alleged that this action by the American Dental Association violated the antitrust laws under the Sherman Act, and attempted to establish the jurisdictional element by claiming that the defendant organization was involved in interstate commerce. The *Nara* court rejected this approach.

However, *Nara* is factually distinguishable from the above cited denial of privileges and access cases which, as stated, held that *both* the plaintiffs' and defendants' interstate activities are to be analyzed in meeting the "effect on commerce" jurisdiction test. In *Nara*, the defendant was a national organization that did not provide dental services nor compete with individual practitioners. Moreover, the suspension of one member of the Association for misconduct

did not effect competition within the dental profession. As noted earlier, the underpinning of the denial of privileges and access cases is the fact that the defendants' challenged activities have the effect of eliminating competition which in turn affects instate commerce activities of treating patients who travel in interstate commerce, purchases of out of state supplies, and receipt of revenue from out of state third party insurers. This aspect of those denial cases is missing in *Nara*. Thus, viewed in light of the anticompetitive aspect of the denial cases, there does not exist in *Nara* a logical nexus between the defendant's challenged activities and interstate commerce. In other words, the *Nara* court, out of necessity, had to analyze the jurisdictional issue based solely on plaintiff's interstate commerce activities. Therefore, the *Cardio-Medical* court incorrectly relied on the *Nara* case to support the proposition that a court must look only to plaintiff's interstate commerce activities to establish the nexus between the challenged activities and interstate commerce.[11]

11. In addition, *Cardio-Medical* also relied upon *Hahn v. Oregon Physicians' Service*, 508 F.Supp. 970 (D.Or.1981) to support this proposition. This Court notes that the Ninth Circuit recently overturned the district court's decision in *Hahn*. *Hahn v. Oregon Physicians' Service*, 689 F.2d 840 (9th Cir., October 5, 1982). Specifically, the Ninth Circuit held that the trial court erred when it determined the jurisdiction issue solely on the plaintiff's interstate commerce activities, since "jurisdiction may also be established directly by the defendants' activities." *Id.*

In addition, the second proposition enunciated in *Cardio-Medical*, first announced in *Spears Free Clinic and Hospital v. Cleere*, 197 F.2d 125 (10th Cir.1952), that the treatment of patients who travel in interstate commerce, the purchase of supplies from out of state sources and the receipt of revenues from out of state third party insurers, do not satisfy the interstate commerce requirement of the Sherman Act, is equally without merit.[12] The Supreme Court, in *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), rejected implicitly the idea that there cannot be a "substantial effect" on interstate commerce if coconspirators "succeed[ed] in blocking ... petitioner's purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies ...." 425 U.S. at 744, 96 S.Ct. at 1852. The "substantial effect" test, therefore, may be satisfied upon *any* showing that there existed an "unreasonable burden on the free and uninterrupted flow of interstate commerce." *Id.* at 746, 96 S.Ct. at 1853.

Moreover, the Third Circuit, which includes the *Cardio-Medical* Eastern District

12. The *Spears* rationale has been relied upon and followed in a number of cases. *See Wolf v. Jane Phillips Episcopal-Memorial Medical Center*, 513 F.2d 684 (10th Cir.1975); *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir.1957); *Capili v. Shott*, 487 F.Supp. 710 (S.D.W.Va.1978), *aff'd*, 620 F.2d 438 (4th Cir.1980); *Nankin Hospital v. Michigan Hospital Service*, 361 F.Supp. 1199 (E.D.Mich.1973).

of Pennsylvania court, expressly rejected the *Spears* rationale in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir.1973). "[T]he [*Spears*] opinion even when it was written placed primary reliance on a series of cases that were no longer valid .... As a result, the reasoning of the opinion rested on flawed grounds when it was issued in 1952." 490 F.2d at 52. The court further held, in contravention of the *Cardio-Medical* holding, that the interstate commerce allegations of treating patients from out of state sources, of the trafficking in out of state goods, and of the receipt of revenues from out of state sources were sufficient to establish jurisdiction under the Sherman Act.[13] *Id.* at 53.

Therefore, the *Cardio-Medical* jurisdictional holding appears to be contrary to the great weight of authority, and this Court declines to follow it. Consequently, the Court finds that plaintiff here has succinctly and sufficiently satisfied the Sherman Act's jurisdictional requirements.

13. Additionally, the Tenth Circuit has cast doubt on the validity of its holding in *Wolf v. Jane Phillips Episcopal-Memorial Center*, *supra*. "[T]o the extent *Wolf* can be read as rejecting, as a matter of law, the possibility that an interstate flow of people seeking a purely local service can have a substantial effect on interstate commerce, it is no longer good law in light of *McLain*." *Crane v. Intermountain Health Care, Inc.*, *supra*, 637 F.2d at 726 n. 4.

PLAINTIFF'S PER SE ARGUMENTS

Defendants argue that the rule of reason is the standard to be exclusively applied in this case. This Court disagrees.

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." 15 U.S.C. § 1. A literal reading of this section would give rise to a finding of violation in every commercial contract that affects interstate commerce. *National Society of Professional Engineers*, 435 U.S. 679, 687–88, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Consequently, the Supreme Court has read the so-called "rule of reason" into the Sherman Act. *Arizona v. Maricopa County Medical Society*, — U.S. —, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Standard Oil Co. v. United States, supra.*

[6] Under the "rule of reason," only unreasonable restraints of trade are forbidden. A restraint of trade is deemed unreasonable where the anti-competitive effects outweigh the procompetitive effects of the challenged activity. *National Society of Professional Engineers, supra*, 435 U.S. at 688–92, 98 S.Ct. at 1363–65. Certain business combinations, however:

> because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unrea-

> sonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable .... Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing ... division of markets ... group boycotts ... and tying arrangements.

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

Despite the Supreme Court's strong endorsement of the use of the per se rule in cases involving the above-mentioned restraints of trade, some lower courts have been hesitant to apply this rule in cases where professionals in the health care field are involved. *See Everhart v. Jane C. Stormont Hospital, supra; Robinson v. Magovern, supra.* This argument has recently been rejected by the Supreme Court in *Arizona v. Maricopa County Medical Society, supra.*

[7] In *Maricopa County*, the defendants, like the defendants in the instant case, argued that courts "should not apply the per se rule . . . because the judiciary has little antitrust experience in the health care industry." —— U.S. at ——, 102 S.Ct. at 2476, 73 L.Ed.2d at 62. However, the Court noted that "[this] argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.' " *Id.*, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940). The Court also rejected the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation. 73 L.Ed.2d at 63. Therefore, although *Maricopa County* involved only allegations of horizontal price-fixing, this Court agrees with plaintiff that other per se violations, including group boycotts and tying arrangements, apply equally to the health care profession. *See Hyde v. Jefferson Parish Hospital District No. 2, supra*. The Court, then, will deal with plaintiff's per se theories seriatim.

1. Illegal Tying Arrangement.

Plaintiff's first per se argument is that the agreement between defendants hospital and AAP constitutes an illegal tying arrangement. A tying arrangement is "an agreement by a party to sell one product

but only on the condition that the buyer also purchases a different (or tied) product ...." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). The Supreme Court has recognized that "the vice of tying arrangements lies in the use of economic power in one market to restrict the competition on the merits in another regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not." *Id.* at 11, 78 S.Ct. at 521.

[8, 9] However, not all tying arrangements are proscribed by the Sherman Act. A tying arrangement is a per se violation of the Act when it exhibits the following four characteristics:

1. two separate products, the tying product and the tied product;

2. sufficient market power in the tying market to coerce purchase of the tied product; [14]

3. involvement of a not insubstantial amount of interstate commerce in the tied market; and

4. anticompetitive effects in the tied market.

Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir.1981).

14. Indeed, the Second Circuit has stated that "actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensible element of a tying violation." *Unijax, Inc. v. Champion Intern, Inc.*, 683 F.2d 678, 685 (2d Cir.1982); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 (2d Cir.1980).

Plaintiffs contend that a tying arrangement exists here because the users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product). Thus, it is contended that we are dealing with two distinct services which a buyer should be able to purchase separately. In support of this per se tying arrangement argument, plaintiff cites *Hyde v. Jefferson Parish Hospital District No. 2, supra.*

In *Hyde,* a plaintiff anesthesiologist was denied staff privileges at a New Orleans hospital because that hospital had an exclusive contract with a professional medical corporation for the provision of anesthesia services. Plaintiff filed suit against the hospital, alleging that the exclusive contract between the hospital and the professional corporation constituted a per se illegal tying arrangement. The district court refused to apply the per se rules of antitrust in this situation and granted judgment to the defendant under the "rule of reason." *Hyde v. Jefferson Parish Hospital District No. 2,* 513 F.Supp. 532 (E.D.La. 1981).

The Court of Appeals for the Fifth Circuit reversed the district court and held that the per se rules of antitrust law apply in cases involving professionals in the health-care industry and that the exclusive contractual arrangement between the hospital and the professional corporation constituted a per se illegal tying arrangement.

Moreover, the court specifically rejected the trial court's finding that plaintiff had failed to demonstrate that the hospital dominated the market for its services. *Hyde v. Jefferson Parish Hospital District No. 2, supra,* 686 F.2d at 289.

[10–16] However, the starting point, the genesis, of the *Hyde* holding was that there existed an exclusive contract, a point that is hotly contested here. "This action was occasioned by the fact that the hospital had an exclusive contract with . . . a professional medical corporation, to provide anesthesia services." *Id.* at 287. Without the showing of an exclusive contract, which is at the core of this action and is obviously the gravamen of all of plaintiff's antitrust theories, the existence of a tying arrangement remains problematical. Therefore, summary judgment on this issue should be denied.[15]

15. Even if plaintiff was to prove the existence of an exclusive contract, there exist many attendant problems with the tying arrangement theory, "market power" for one. Plaintiff is quite correct in contending that it does not have to prove that the hospital totally dominated the market. All that plaintiff must show is that the hospital possessed "sufficient economic power to impose an appreciable restraint on free competition in the tied product . . . ." *Northern Pacific Ry. Co. v. United States, supra,* 356 U.S. at 11, 78 S.Ct. at 521.

As a first step, in demonstrating "sufficient market power," plaintiff must demonstrate the relevant geographic market for the hospital's

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services. Then it must be shown that, within that geographic market, the seller (here hospital) "has the power ... to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *United States Steel v. Fortner Enterprises*, 429 U.S. 610, 620–21, 97 S.Ct. 861, 867–68, 51 L.Ed.2d 80 (1977); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *IBM Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936).

There exist many problems and pitfalls in establishing the above two factors. First, there is a serious question whether the relevant market area can be sliced so small as to embrace a single hospital. The district court in *Hyde* held that the relevant geographic area included an area of at least twenty hospitals, and therefore concluded that if both patient and surgeon are free to go to any one of a large number of competent institutions, the hospital does not possess the power to force the tied product upon consumers. *Hyde v. Jefferson Parish Hospital District No. 2, supra*, 513 F.Supp. at 540. Other courts have accepted this reasoning. *See Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir.1982); *Harron v. United Hospital Center, Inc.*, 522 F.2d 1133 (4th Cir.1975) (per curiam), *cert. denied*, 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 (1976).

However, the Fifth Circuit in *Hyde* took note of several market imperfections in the health care industry. "First, the prevalence of third party payment of bills eliminates a patient's incentive to compare the relative cost effectiveness of competing hospitals. A second market

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imperfection is the lack of complete information regarding the quality of medical care offered." *Hyde v. Jefferson Parish Hospital District No. 2, supra,* 686 F.2d at 290. Therefore, the Court concluded, patients tend to choose hospitals by location rather than price or quality, which means that the geographic market area apparently may subsume only an individual hospital.

Plaintiff here alleges that the defendant hospital is the *only* major facility in a tri-county service area, and moreover, it is the only hospital facility in Clinton County, New York. Plaintiff further alleges that patients flock to the hospital due to its size, location, reputation, scope of services offered, and also due to the fact that it is the area's only referral hospital. (Konik Affidavit, Ex. 8–12). If plaintiff is able to prove these allegations at trial, it is unnecessary for this Court to enter the fray concerning whether the relevant market area may be limited to a single hospital since the allegations here distill down to one contention that there exists *no* relevant competition among hospitals in the area. However, even if plaintiff fails to prove the above, a relevant market area may still be demonstrated, this Court believes, by showing that patients tend to choose hospitals by location, rather than by price or quality.

As for the second prong of demonstrating "sufficient market power," that is, that within the relevant market area it must be shown that the hospital is able to coerce its purchasers of services into accepting "burdensome terms [here exclusive contract] that could not be exacted in a completely competitive market," *United States Steel v. Fortner Enterprises, supra,* 429 U.S. at 620–21, 97 S.Ct. at 867–68; plaintiff must show that patients are compelled to purchase the hospital's chosen anesthesia service in return for the use of the hospital's operating room and analagous services. In

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other words, there must be evidence proffered that patients requested Dr. Konik, or other anesthesiologists, and were refused. There must have existed, then, competition between anesthesiologists insofar as patients are concerned. *See United States v. American Society of Anesthesiologists, Inc.*, 473 F.Supp. 147, 160 (S.D.N.Y.1979). If this cannot be shown, the factor of impermissible coercion is missing from the tying arrangement equation and, consequently, plaintiff cannot prevail on this theory. A demonstrated exclusive contract would then be lawful.

Finally, there are two additional problems here. First, it is conceded that if defendant hospital affords proof of a legitimate articulated medical reason for the existence of the tying arrangement, and further demonstrates that there does not exist a less restrictive way to accomplish the end which justifies that medical reason, defendant hospital will be insulated from liability. *See Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir.1976); *Smith v. Northern Michigan Hospitals, Inc.*, 518 F.Supp. 644 (W.D.Mich.1981). Here, defendant alleges that the tying arrangement provides for continuous coverage and medical competency. However, at least for purposes of this motion, these contentions appear to be refuted by Dr. Konik's assertion that all staff physicians must guarantee medical competency and needed round-the-clock services. (Konik Affidavit, Exs. 13, 14, 15, 16 and 46).

Second, this Court agrees with defendants that under the tying arrangement theory of liability, only the hospital may be liable. This is so since the AAP lacks sufficient market power in the tying product to have anticompetitive effects on the market, *see, e.g., Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *IBM Corp. v. United States, supra*, and plaintiff has not pleaded a conspiracy to engage in a tying agreement between the hospital and the group. (Complaint, ¶ 42).

2. The agreement between the defendants constitutes an illegal price fixing agreement.

[17] Plaintiff contends that section 3(c) of the agreement, which provides that "[f]ees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York," [16] establishes unlawful maximum price fixing between defendants. Although this Court does not quarrel with plaintiff's assertion that maximum—as well as minimum—price fixing is a per se evil proscribed by the Sherman Act, *see Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968),[17] it is not clear that the hospital did not stand in the position of a buyer of anesthesia services, and, as such, had a right to set the fees at which it would then distribute those services. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). Moreover, the *sine qua non* of this, and plaintiff's other theories, that there exists an exclusive contract, has yet to be proven.

16. *See* Appendix A, *infra*.

17. "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." *Albrecht v. Herald Co., supra*, 390 U.S. at 152, 88 S.Ct. at 873.

[18–22] Instead, this Court believes that, with one exception,[18] this matter should be properly treated, once the exclusivity of the contract has been demonstrated, as one involving a vertical combination. *See Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). Such a vertical combination should be analyzed under the rule of reason. *Tampa Electric Co. v. Nashville Coat Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.1982). As the name suggests, the rule of reason requires the trier of fact to decide whether under all of the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. *Arizona v. Maricopa County Medical Society, supra; Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). "The true test of legality is whether the restraint imposed is such as merely regulates and

18. However, plaintiff may prevail on a per se price fixing theory here if it can be shown that the agreement or combination was "formed for the *purpose* and with the *effect* of raising, depressing, fixing, pegging or stabilizing the price of a commodity (here anesthesiology services) in interstate or foreign commerce ...." (emphasis added) *Arizona v. Maricopa County Medical Society, supra*, —— U.S. at ——, 102 S.Ct. at 2474, 73 L.Ed.2d at 60 (quoting *Kiefer-Stewart Co. v. Segram & Sons*, 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219 (1951)). This is a question of fact that remains to be proved, if possible, at trial.

perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 691, 98 S.Ct. at 1365 (quoting *Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918)).

[23, 24] Here, in the context of a demonstrated exclusive dealing arrangement, the plaintiff may prevail only upon a showing that the agreement results in a substantial foreclosure of competition in an area of competition, that is, in a relevant market. *Tampa Electric Co. v. Nashville Coal Co., supra*, 365 U.S. at 327–28, 81 S.Ct. at 627–28. Since these factors have not been amply demonstrated, summary judgment should be denied on the vertical combination contention. *See Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.1978).

3. The fee schedule set by the members of AAP constitutes an illegal price-fixing arrangement.

In *Arizona v. Maricopa County Medical Society, supra*, the Supreme Court held that a horizontal arrangement between physicians to establish the maximum fees they could claim in full payment for health services provided to policy holders of specified plans was a per se violation of the Sherman Act. In *Maricopa County*, seventy percent of the physicians in that county formed two non-profit foundations for the purpose of

promoting fee-for-service medicine and to provide an alternative form of health insurance coverage. The physicians agreed to accept the fees set by the foundations as full payment for services provided patients insured under the foundations' plan. The foundations used relative values and conversion factors in compiling their fee schedule.[19]

In concluding that this scheme was a per se violation, the Court stated:

> In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the

19. Thus, for example, the conversion factors for "medicine" and "laboratory" were $8.00 and $5.50, respectively, in 1972, and $10.00 and $6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service—thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical societies about the need for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.
Arizona v. Maricopa County Medical Society, supra, — U.S. at ——, 102 S.Ct. at 2471, 73 L.Ed.2d at 56.

> market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

—— U.S. at ——, 102 S.Ct. at 2475, 73 L.Ed.2d at 61.

Here, plaintiff argues that defendant AAP has set a fee schedule similar to that of the foundations in the *Maricopa County* case, and, therefore, since there is no price competition among the individual members of the professional corporation, the fee schedule adopted by AAP constitutes an illegal price fixing arrangement, a per se violation of the Sherman Act.[20] Plaintiff,

20. Plaintiff alleges that AAP:

> establishes its price based upon units. Two (2) distinct units are used, the first set is based upon the complexity of the procedure used; these units are established by the American Society of Anesthesiologists. The second set is based upon time: 15 minutes equals one unit. The classes of units are added together then multiplied by a dollar value to determine the fee charged. The dollar value is set by the P.C. [AAP]. This value has periodically been raised. No member of the P.C. has charged anything but the fees set by this arrangement. Any price modification is subject to unanimous agreement of all members of the P.C., at a board meeting. The P.C. also sets a flat fee for O.B. services provided. Again, no member of the P.C. has charged less then [sic] the fee established.
>
> In addition to the doctors at the P.C. following this fee schedule the *nurse anesthestists* [sic] employed at the P.C. employ the same schedule. There is no differential in

(Footnote continued on next page.)

however, misses the point of the *Maricopa County* holding, which deals exclusively with a horizontal price fixing arrangement between hundreds of competing physicians. Here in contrast, we are dealing, concededly, with a professional corporation, a situation which is expressly exempted from the *Maricopa County* holding:

> The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a

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(Footnote continued.)

> the dollar value assigned to units associated with a doctor at the P.C. than those associated with a nurse anesthestists [sic]. The fees charged by each are identical. In addition, there is no competition with the P.C. for the provision of anesthesia services at the defendant, medical center.

(Memorandum of Law, p. 18).

> price fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold.

— U.S. at ——, 102 S.Ct. at 2479, 2480. 73 L.Ed.2d at 66, 67.

[25, 26] Since the situation at bar involves a small professional corporation, the functional equivalent of a partnership arrangement for antitrust purposes, plaintiff's motion for summary judgment is denied on this price fixing contention and, conversely, granted in favor of the defendants as a matter of law.

4. Denying plaintiff access to the hospital facilities because of her refusal to partake in an allegedly illegal and exclusive price fixing agreement constitutes an illegal boycott.

Plaintiff argues that defendants, by refusing Dr. Konik access to the hospital facilities due to her refusal to join an allegedly illegal and exclusive price fixing agreement, are per se liable under an illegal boycott theory. It must be noted that cases applying per se illegality to collective refusals to deal fall into three categories.

The first group, exemplified by *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude

direct competitors from the market. *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). *Klor's, Inc. v. Broadway-Hale Stores, supra*, illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination.[21] *See also Radiant Burners, Inc. v. People's Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). The third group of cases, unlike the first two categories, has concerned combinations designed to influence coercively the trade practices of boycott victims rather than to eliminate them as competitors. The leading case in this group is *Fashion Originators Guild of America v. Federal Trade Comm'n*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), in which a group of designers refused to sell their "creations" to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal per se, the Court stated that even

21. In *Klor's* a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendants manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive Klor's out of competition with Broadway-Hale, the Court found the tripartite agreement illegal per se, notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's, probably had no anti-competitive motive.

though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate "style piracy," the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason.[22]

[27, 28] In all of these cases, the cornerstone of per se illegality has been the *purpose* and *effect* of the questioned arrangement:

> where exclusionary or coercive conduct has been present, the arrangements have been viewed as 'naked restraints of trade', and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal.

E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir.1972). Therefore, the resort to the per se rule is justified only when there exists the presence of exclusionary or coercive conduct which, when present, warrants the view that the arrangement is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the agreement.

22. *See also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951) (liquor manufacturers' collective refusal to sell to price-cutting wholesalers).

See Oreck Corp. v. Whirlpool Corp., supra.[23]

23. Defendants cite *Oreck Corp. v. Whirlpool Corp., supra*, for justification that plaintiff's group boycott theory should be analyzed solely under the rule of reason standard since only a "vertical" restraint exists here. However, it is clear that defendants have misread *Oreck*.

Oreck involved a case where a dealer's [Oreck Corporation] exclusive distributorship was cancelled by a manufacturer [Whirlpool]. The Second Circuit in *Oreck* distinguished the Supreme Court's holding in *Klor's Inc. v. Broadway-Hale Stores, Inc., supra*, in that *Klor's* specifically exempted from per se liability a situation where a manufacturer and its dealer agreed to an exclusive distributorship. *Klor's Inc. v. Broadway-Hale Stores, Inc., supra*, 359 U.S. at 212, 79 S.Ct. at 709. Thus, "[t]he present case, involving as it does an alleged agreement between a single manufacturer and a single dealer, is in essence, an exclusive distributorship controversy [and subject to rule of reason analysis], and the 'group boycott' doctrine is, therefore, not applicable." *Oreck Corp. v. Whirlpool Corp., supra*, 579 F.2d at 131.

However, *Oreck* does not, as defendants contend, hold that all "vertical" restraint cases must be analyzed under the rule of reason standard. Such a view would nullify the *Klor's* and *Fashion Originators Guild of America, supra*, holdings. Indeed, plaintiff's argument here is predicated, it seems, not on the cancellation of *her* agreement with the hospital (a theory that would place plaintiff under the *Oreck* case), but on a situation where it is alleged the defendants combined to exclude her from a market or to coerce her into ratifying the hospital-AAP "exclusive" contract (allegations that fall under *Klor's* and *Fashion Originators Guild*).

[29, 30] Plaintiff claims here to fall under both the second and third type of per se group boycott. Specifically, plaintiff alleges that the purpose of the "exclusive" agreement between defendants was to either "drive her out of business" or to coerce her into entering or ratifying an illegal price fixing agreement. (Konik Affidavit, *supra*). It is clear, then, that if proof of these allegations exists, defendants will be liable under the per se group boycott analysis. However, it is equally clear to this Court that plaintiff's summary judgment motion on the above contentions is premature. There exists numerous factual issues remaining to be resolved in the group boycott claim.

5. Defendants have violated the essential facilities doctrine by denying plaintiff access to the hospital facilities.

The plaintiff has advanced the theory that the defendants have violated the essential facility doctrine. This doctrine, recently defined by the Court of Appeals for the District of Columbia, establishes the rule that "where facilities cannot be practically duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility." *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir.1977) (quoting A.D. Neale, *The*

Antitrust Laws of the United States, 67 (2d ed., 1970)).[24]

[31] The essential facility doctrine, also called the "bottleneck principle," derives from the Supreme Court's 1912 decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), and more recently was reaffirmed in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78, 93 S.Ct. 1022, 1029–30, 35 L.Ed.2d 359 (1973). To be "essential," a facility need not be indispensable; it is sufficient if duplication of the facility would be economically unfeasible and if denial of its use inflicts a severe handicap on poten-

24. In *Hecht*, plaintiff attempted to acquire a professional football franchise in Washington, D.C., from the American Football League. To acquire a franchise, the plaintiff had to secure a stadium for the team. The only facility available was RFK Stadium. RFK Stadium was the home of the National Football League, Washington Redskins. The Redskins held a long-term lease at RFK Stadium. This lease contained a restrictive covenant which provided that no other football team could rent RFK Stadium during the lease term. The owners of RFK Stadium had tentatively arranged a lease with the plaintiffs for the use of RFK Stadium. However, the deal failed when the Redskins refused to waive their restrictive covenant. The Court in *Hecht* stated that although, "a restrictive covenant did not violate Section 1 of the Sherman Act unless it is an unreasonable restraint of trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition excluded and the restraint is thus unreasonable per se." *Hecht v. Pro-Football, Inc.*, *supra*, 570 F.2d at 993 n. 45.

tial market entrants. *See, e.g., Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1320 (9th Cir.1975), *cert. denied*, 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976). However, the *Hecht* court warned, "this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." 570 F.2d at 992–93.

[32] Plaintiff claims that defendant hospital is an essential facility, since the hospital is the only major medical facility in the tri-county Plattsburgh area,[25] since it is operating continuously and providing major anesthesia services, since it is the area's only referral hospital and teaching institution, and since its reputation and the expertise of its staff are unequaled in the tri-county area. (Konik Affidavit). However, it is not clear, at this point, even assuming, *arguendo*, that defendant hospital is an "essential facility,"[26] that plaintiff has been unfairly denied use of the hospital facilities.[27] Indeed, it has not even been established that the contract between the de-

25. Clinton, Essex and Franklin Counties.

26. Defendants contend that there exist many hospitals in the tri-county area that duplicate defendant hospital's services.

27. Defendant hospital, moreover, may demonstrate that an exclusive agreement may serve to improve the delivery of anesthesiology services and, thus, be justified under *Hecht*.

fendants is an exclusive dealing agreement or that Dr. Konik was justified in not partaking in that agreement. Summary judgment on this issue also must be denied.

DEFENDANTS' FURTHER SUMMARY JUDGMENT CONTENTIONS

[33] Besides defendants' jurisdictional argument and their contention that there exist no facts which can support the presence of an exclusive dealing contract, illegal tying arrangement, group boycott and exclusive facility, all of which this Court believes are questions left to be resolved by the trier of facts, defendant hospital contends that its actions are exempt from Sherman Act liability under the *Colgate* doctrine. Under the doctrine, enunciated in *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), unilateral policy decisions, motivated by "market strategy" or "business necessity," which impose a reasonable vertical restraint, cannot give rise to antitrust liability.[28] *See also Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.1976), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976); *Modern Home Inst. Inc. v. Hartford Acc. & Indemnity Co.*, 513 F.2d 102, 108–09 (2d Cir.1975).

[34] Here, it is argued that the hospital is acting in a reasonable manner by requir-

28. In *United States v. Colgate*, *supra*, the Court held that a seller has complete freedom to select his own customers absent an attempt to enforce retail price maintenance.

ing an agreement to provide regularity in the delivery of anesthesiology services. However, it is not apparent that the agreement is necessary to provide such services. (Konik Affidavit, ¶ 33). Moreover, since plaintiff's group boycott theory remains to be established at trial, it would be inappropriate to grant summary judgment on behalf of defendant hospital under the *Colgate* doctrine.[29]

Finally, defendants assert that the agreement between the parties cannot possibly be exclusive since Dr. Konik has been asked many times to become a signatory of the agreement. Therefore, the argument goes, since plaintiff's Section 1 claims are all predicated on the existence of an exclusive agreement, the non-existence of exclusivity warrants summary judgment.

[35] While this Court agrees with defendants that plaintiff's Section 1 claims

29. As the Court in *Cernuto, Inc. v. United Cabinet Corporation*, 595 F.2d 164, 168, (3rd Cir. 1979), stated:

> [w]hen a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraint... However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer level.

are predicated upon the existence of an exclusive agreement, the very fact that plaintiff refused to join in the agreement does not necessitate an award of summary judgment. This is true for two reasons. First, defendants' offer to join plaintiff to the agreement is only *some* evidence of non-exclusivity. Plaintiff may still demonstrate that, as to others, this agreement remains closed and that an exclusive dealing contract exists. Second, plaintiff alleges that the contract itself is unlawful. To force plaintiff to agree to, and abide by, the allegedly unlawful contract in order to be able to attack that agreement under the Sherman Act would present Dr. Konik with the ironic situation of litigating the lack of competition while being a party to the restraint of trade, a position that this Court finds untenable.

IV

In conclusion, since there are a number of material facts remaining to be resolved, plaintiff's motion for partial summary judgment is denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Defendants' motion for summary judgment is granted to the extent that plaintiff's horizontal price-fixing claim is dismissed in accordance with the above, and denied in all other respects.

This Memorandum-Decision and Order is intended to support and modify the Order

signed on February 1, 1983 denying summary judgment in this action.

It is so Ordered.

APPENDIX A

MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding made this 31st day of August, 1978, by and between CHAMPLAIN VALLEY-PHYSICIANS HOSPITAL MEDICAL CENTER, a membership corporation with an office and place of business in the City of Plattsburgh, County of Clinton and State of New York, party of the first part; ANESTHESIA ASSOCIATES OF PLATTSBURGH, P.C., a professional corporation having its principal place of business at 265–A Cornelia Street, Plattsburgh, New York, party of the second part; and LOUISE S. KONIK, M.D., of 29 Grace Avenue, Plattsburgh, New York, party of the third part, in manner following:

WITNESSETH:

WHEREAS, party of the first part must provide community anesthesiology services sufficient in quantity and quality to meet the ongoing surgical and obstetrical demand of its patients and wishes to assure the proper and timely availability of such service; and

WHEREAS, parties of the second and third parts have heretofore *demonstrated their ability to provide high quality anesthesiology services* to party of the first part

and are well qualified to continue to do so by reason of their familiarity with the community and its people and with the facilities, medical staff, employees, practices, procedures, rules and regulations of party of the first part; and

WHEREAS, parties of the second and third parts are willing to assume the responsibility of providing the community anesthesiology service required at whatever level is required.

NOW, THEREFORE, considering the need to provide for the *continuing welfare of the Medical Center*, it is understood that party of the first part *will afford to parties* of the second and third parts the facilities for providing anesthesiology services as long as the understandings included herein are complied with, and parties of the second and third parts will and do themselves, or in conjunction with any others hereafter admitted to the Medical Staff of party of the first part, undertake to provide the required services in the following manner and under the following terms and conditions which *shall be reviewed every six months by the parties hereunto.*

1. DEFINITION OF SERVICE REQUIRED:

The service of a qualified anesthesiologist or duly certified nurse anesthetist available at all times and, when needed as determined by a designee of party of the first part, present in surgical or delivery rooms either personally administering or supervis-

ing the delivery of anesthesia. When nurse anesthetists are utilized, they must be supervised by an anesthesiologist in a manner consistent with the New York State Health Code and all other applicable rules and regulations.

2. AMOUNT OF SERVICE REQUIRED:

(a) Sufficient anesthesiology services as defined above to complete in an efficient and timely manner all of the routine surgical cases scheduled on a daily basis by the hospital operating room supervisor.

(b) Sufficient anesthesiology services as defined above to provide 24-hour-a-day, 365-days-a-year emergency coverage as required. Such emergency coverage shall be available within fifteen minutes to the operating room.

(c) Sufficient anesthesiology services as defined above to provide 24-hour-a-day, 365-days-a-year services to the Obstetrical Department. Such anesthesiology services shall be available within fifteen minutes to the operating room or to the delivery suite.

3. TERMS AND CONDITIONS:

(a) The Chief of the Anesthesiology Service *will* make all work and room assignments for all anesthesiologists in a fair and equitable manner and a manner consistent with meeting all of the service requirements of the hospital.

(b) Patient or physician requests for a specific anesthetist or anesthesiologist will be acknowledged and granted where such requests do not duly disrupt the routine operation of the surgical department or obstetrical department or of the hospital, or in any other way infringe upon the rights of other patients for prompt, safe and efficient service. In the event of a dispute not resolved by the Chief of Anesthesiology Services, the Chief of the Medical Staff will make final decisions with respect to patient requests and anesthesiologist room assignments.

(c) Fees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York.

(d) No more than ten (10) vacation days will be taken by any anesthesiologist during June, July and August without written agreement between the parties and rotating call schedules shall be established by the Chief of Anesthesiology Service for holidays including Christmas, Easter, Fourth of July and Labor Day unless the parties otherwise agree. In the event of the temporary inability of any anesthesiologist to perform his or her duties pursuant to this Understanding by reason of sickness or accident, each of the parties of the second part and third part agrees to continue to provide full coverage to the Medical Center during such period of inability.

4. Nothing in this understanding shall be construed as imposing or creating an

employer-employee relationship between the parties, parties of the second and third parts to be independent *contractors* billing on a fee-for-service basis and each handling its own billing and accounting.

5. Parties of the second and third parts agree to work in accordance with the terms of this Understanding subject to the rules and regulations of the Board of Directors of the Medical Center; the rules and regulations and by-laws of the Medical Center's Medical Staff; appropriate New York State Department of Health codes and regulations; and the requirements of the Joint Commission for Hospital Accreditation.

6. In the event of any dispute between the parties relative to the method of carrying out the terms of this Understanding not resolved as hereinabove set forth, the matter shall be referred to the Executive Committee of the Board of Directors whose decision shall be promptly rendered and shall be final and binding upon all parties.

IN WITNESS WHEREOF, the parties have set their hands and seals the day and date first above written.

CHAMPLAIN VALLEY-PHYSICIANS
HOSPITAL MEDICAL CENTER

By: /s/ David Hannan
President

ANESTHESIA ASSOCIATES OF PLATTSBURGH, P.C.

By: /s/ John Menustik
President

LOUISE S. KONIK, M.D.

ON MOTION FOR DIRECTED VERDICT

Before this Court are the parties' cross motions for a directed verdict at the close of all the evidence. Also before the Court is the defendants' motion for directed verdict made at the close of plaintiff's evidence.

These motions are made pursuant to the provisions of Rule 50(a) of the Federal Rules of Civil Procedure.

Plaintiff has remaining four theories predicated on Section 1 of the Sherman Act and three remaining theories based on Section 2 of that Act. I will first address the Section 1 theories.

As I stated in my February 28, 1973 summary judgment opinion, the genesis, the starting point, of all of plaintiff's antitrust claims is the existence of an exclusive contract. Here, the overwhelming evidence demonstrates that the contract was non-exclusive. The tortured history of contractual negotiations between the hospital, the AAP, and Dr. Konik shows that, although the proposed contractual arrangements prior to Dr. Konik's departure from the AAP may have provided for an exclusive dealings contract, and indeed for a written fee schedule, these terms were deleted from the final August 31, 1978 agreement. That agreement is now in effect and contemplates that other anesthesiologists not now members of the AAP may in the future be admitted to

the medical staff and provide anesthesiology services at the hospital. Therefore, it is contemplated that there be competition among anesthesiologists. Further evidence of non-exclusivity is found in testimony indicating that Dr. Konik had the option of re-joining the AAP as an active participant or providing services to the hospital on an independent basis, subject to the terms of the proposed agreement between herself, the AAP and the hospital. Other evidence of non-exclusivity includes the deposition testimony of Dr. Pang, who, after being denied membership in the AAP, was nonetheless offered the privilege of providing anesthesiology services on an independent basis.

The only cogent evidence that plaintiff presents concerning the exclusivity issue is the ambivalent testimony of Dr. Modak. Although Dr. Modak testified that Dr. Bayoumy, chief of anesthesiology and a member of the AAP, told him that membership in the AAP was a prerequisite to the provision of anesthesiology services at defendant hospital, Dr. Modak also testified that he was instructed by Dr. Moynihan, the hospital's chief of staff, that Dr. Modak could, in fact, practice at the hospital without joining the AAP and should file an application for staff privileges. That application was submitted but later withdrawn.

[36] Moreover, the evidence of minutes of the AAP's internal proceedings which plaintiff relies on to demonstrate the exclusivity of the contract merely shows that the

AAP wished to enter into some form of accommodation with Dr. Konik. It by no means demonstrates that the agreement presently in effect is an exclusive dealings arrangement nor does it indicate some form of conspiracy to exclude plaintiff from the practice of medicine. In short, then, the overwhelming evidence presented to this Court is that there exists no exclusive arrangement in fact among the defendants.

[37] I want to make several related points. Plaintiff feels that the very existence of a contract between the hospital and the AAP constitutes an illegal arrangement. This belief apparently is based on the fact that the purpose of that contract is redundant of the purposes achieved by the by-laws of the hospital and the rules and regulations of the anesthesiology department providing for 24-hour continuous and quality-controlled anesthesia service. Plaintiff misses the point. The hospital has the right to contract with any party it chooses in order to provide services. See *U.S. v. Colgate and Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

[38] Here plaintiff must demonstrate that the contract is unlawful or that the purpose of the contract, besides being superfluous, is unlawful. This was not done. The existence of the contract by itself proves nothing.

[39] Regardless of whether exclusivity has been demonstrated, plaintiff, I believe,

has failed to show several other elements in support of her remaining Section 1 claims. With respect to plaintiff's vertical price fixing claim, there is no evidence on record that defendant hospital and AAP conspired to, or, in fact, fixed prices. Although Section 3(c) of the 1978 agreement provides that,

> "Fees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York",

this Court finds that the quoted language by itself is not evidence of price fixing. Accordingly, any finding that defendants have combined to fix prices would be speculation at best. Therefore, plaintiff has proffered not a scintilla of evidence in support of her vertical price fixing theory.

As to any rule of reason argument, the only anti-competitive effects that plaintiff has alleged is the exclusion of Dr. Konik from the hospital's facilities. However, as indicated earlier, plaintiff has failed to demonstrate the exclusivity of the contract at issue. Therefore, there is absolutely no showing of anti-competitive effects from the arrangements between the hospital and the AAP. Accordingly, plaintiff's rule of reason arguments must fail as well.

[40, 41] As to the group boycott argument, there is no evidence before me to support this theory. First, there is no evidence that the contract is exclusive and

therefore prohibits plaintiff from competing with the AAP. Second, there is a total failure of evidence indicating a conspiracy or combination to boycott plaintiff or to preclude her from the practice of medicine. In fact, the evidence is all to the contrary. Defendants, it appears, made substantial efforts to accommodate Dr. Konik in the proposed arrangements. Additionally, as to the essential facility doctrine, assuming that defendant hospital is such a facility, plaintiff has nonetheless failed to demonstrate any severe economic handicap resulting from her alleged exclusion. In fact, there is testimony indicating that plaintiff has worked, and can continue to work, in other facilities.

Finally, I want to emphasize again that underlying each of plaintiff's Section 1 claims is the alleged exclusivity of the contract at issue. Having failed to adduce evidence of this exclusivity, each of plaintiff's Section 1 claims must fail.

[42] Moreover, for the same reason, plaintiff's Section 2 claims must also fail, since it has not been shown that defendants eliminated significant competition or attempted or conspired to eliminate competition.

The test for a directed verdict in this circuit is as follows, and I quote from *Epoch Producing Corporation v. Killiam Shows, Inc.*, 522 F.2d 737, 742–43 (2d Cir.1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1429, 47 L.Ed.2d 360.

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury."

Applying that test to the motions made at the conclusion of the evidence in this case, it is clear that there was a failure of proof on all the plaintiff's claims.

The Court's rulings are as follows:

Number 1, the motion by defendants for directed verdict at the close of plaintiff's evidence is denied.

Number 2, the motion by plaintiff for a directed verdict at the close of all of the evidence is denied.

Number 3, the motion by defendants for a directed verdict at the close of all of the evidence is granted.

The clerk is directed to enter judgment accordingly.

APPENDIX D.

Statutues Involved.

Section 1 of the Sherman Act; 15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or foreign nations, is hereby declared to be illegal." July 2, 1890, c. 647, §1, 26 Stat. 209.

Section 4 of the Clayton Act; 15 U.S.C. §15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Oct. 15, 1914 c. 323, §4, 38 Stat. 731.

Section 16 of the Clayton Act; 15 U.S.C. §26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18, and 19], when and under the same conditions and principles as injunc-

tive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven [49 USCS §1 *et seq.*] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." (Oct. 15, 1914, c. 323, §16, 38 Stat. 737).

APPENDIX E.

Rule 50(a), Federal Rules of Civil Procedure, Motion for Directed Verdict.

"A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."